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NME HOSPITALS V. RENNELS

CARR: Dr. Rennels in this case alleges that she was a victim of sex discrimination and retaliation by her employer, Sierra Laboratory Associates. But she knows that she cannot sue Sierra Laboratory Associates because they do not have 15 employees.

So the question today is: Can she sue a Texas employer, Sierra Medical Center or NME Hospitals by whom she admittedly has never been employed, never sought to be employed under any state statute? We believe it's clear,under the federal law Title Seven in the Civil Rights Act, the Fifth Circuit has so held, she cannot sue. She has sought in this case then, to sue Sierra Medical Center under the Texas equivalent of Title Seven, which is the Texas Commission on Human Rights Act (TCHRA). The problem is, the legislature has said: Texas courts are to interpret the TCHRA in such a way as to achieve the same result as if she had sued under the federal law.

BAKER: What is the claim that you're appealing that she asserts? What's left?

CARR: What is left is a claim under TCHRA for retaliation by Sierra Medical Center because we were on notice that she was complaining about an unlawful employment practice by Sierra Laboratory Associates.

BAKER: So it's the sex discrimination claim only?

CARR: It's strictly the sex discrimination claim.

BAKER: Would it be a fair statement that NME is sued because of "A conspiracy with the laboratory to accomplish this discrimination"?

CARR: That is a second count.

BAKER: But you have to have a tort in the first place to use conspiracy in the second place don't you?

CARR: Certainly.

BAKER: So if the claim against the laboratory is a valid one, then the fact issue is whether NME conspired to carry-out that, is that right?

CARR: That would be the case. But I think it's admitted that she cannot maintain any sort of discrimination against SLA because they are not covered by the law. They have fewer than

15 employees.

BAKER: So in other words, your view is that the laboratory can't discriminate because it's not covered by either law; therefore, the conspiracy claim fails because there's no statutory tort?

CARR: That's correct.

BAKER: Then all that's left is the statutory tort?

CARR: In our opinion, yes.

ABBOTT: Would you clarify one fact for me, the import of the fact. In the CA opinion and at least in the respondent's brief they say that Fry told Pester that he had no plans to allow Rennels to become a shareholder in SLA and requested Pester's help. How can Fry have no plans to allow her to become a shareholder if he has no control over her?

CARR: I can't answer that question, because that's a fact issue that's in dispute. We have assumed it of course for summary judgment purposes. Mr. Fry and Dr. Pester both deny that that statement was made. I think the theory is that you would in some way use whatever pressure Sierra had on Sierra Laboratory Associates to induce that result. I believe that's the theory.

ABBOTT: And if that situation exists where that type of pressure can be exerted to require someone to be terminated why would that not establish the type of relationship that would bring this within the Act?

CARR: It wouldn't for a couple of reasons. First of all, we believe that the case law shows that there has to be a direct employment relationship between Dr. Rennels and Sierra. She has disclaimed any effort to establish that. As one of the amicus briefs suggest there is an out perhaps left by the Fifth Circuit for a person to attempt to do that under the common law control hybrid test, but she has disclaimed any desire to do that in this case.

ENOCH: But there's some notion of a hybrid or a modified *Sibley* test because of the language in Title Seven or TCHRA that says: discrimination by an employer harming a person (they don't use the word 'employee'), is something more than simply a conspiracy here. There is some discussion about the use of the word 'person'. Was it meant to cover somebody other than strictly a direct employee?

CARR: I think that's an important question, and I think if one understands the history, he'll see that that argument is not a valid argument. To do so, I think it's imperative that one compare the language of the federal statutes, §704a of Title Seven. It's codified at 42 U.S.C. §2000e-3(a). And then compare that with the comparable state language. The federal language says: 1) it shall be an unlawful employment practice for an employer to discriminate against any of his employees or

applicants for employment; 2) for an employment agency or joint labor management committee controlling the apprenticeship, training, retraining, on the job training to discriminate against any individual; or 3) for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice, made an unlawful employment practice by this act, subchapter that is by Title Seven.

Now you compare the state statute. The state statute is - I submit the legislature simply wanted to chop down fewer trees, so they greatly shortened the language, but I don't think they intended any different result: An employer, a labor union, or an employment agency, they lump them all together commits an unlawful employment practice if the employer, labor union or employment agency retaliates or discriminates against a person who under this chapter opposes a discriminatory practice. You see the very close parallel in the language. And I would submit that the only reason the legislature used 'person' instead of his employee, individual union member three times is to shorten it and the only generic noun that fits in the legislature's formulation of this provision is person or individual.

ENOCH: But if we are required to apply this law similarly to Title Seven, then don't you have a US DC opinion out of East Texas that talks about a modified rule? Don't we run into this problem?

CARR: You would if the Fifth Circuit hadn't clearly repudiated it. *Daniels,* out of the Eastern District, we submit is clearly not the law in the Fifth Circuit. Because the Fifth Circuit has made it - I think it was as clear as early as 1990 in the *Fields* case, but if there was any question left in 1997 in *Bloom* - you see *Daniels* is - the analysis in *Daniels* is based on the *Sibley* case out of the DC circuit. The Fifth Circuit in 1997 said: *Sibley* is not the law in this circuit. So *Daniels* is not good law. And that's the reason the court doesn't have to concern itself with *Daniels*. But the only reason the legislature said 'person' rather than 'the three-fold analysis' and I say the only reason, I cannot find any legislative history to the contrary, I can't find any court to the contrary, in fact, all the legislative history says: The legislature intended the same result under state law as controls under federal law.

HANKINSON: Look at the current status of federal law, hasn't the DC circuit itself in 1979 modified its original test in *Sibley,* so that it too follows the hybrid economic realities common law control test?

CARR: No question about it.

HANKINSON: And since 1979, the DC circuit has only applied that test?

CARR: That's correct.

HANKINSON: Is it safe to say that uniformly throughout the circuits that is the test that is

applied under Title Seven, or are there any circuits left to apply the pure *Sibley* test?

CARR: I do not know of any circuits that still apply the pure *Sibley* test.

HANKINSON: And so really the Fifth Circuit in interpreting it, if we focus on the Fifth Circuit cases, does require an employment relationship but it may not be the classic one. It is in connection with this particular test. They define it as an employment relationship.

CARR: Yes. But Dr. Rennels has disclaimed any effort to come under that in this case.

HANKINSON: I understand. She's claiming that there need not be any relationship, any type of employment relationship under any test whatsoever?

CARR: That's right.

HANKINSON: The point of my question is, do we have really any debate under federal law with respect to what the requirement is vis-a-vis an employment relationship under Title Seven?

CARR: We certainly don't in the Fifth Circuit. There are some old cases in other circuits that would suggest they may rule differently, but not in the Fifth Circuit.

HANKINSON: Are most of those cases - do they predate the development of this hybrid test?

CARR: Most of them do. Yes.

PHILLIPS: You mentioned earlier that the Texas legislature had indicated that our law should be - the state should develop its law consistent with the federal law within this circuit?

CARR: Well it doesn't say within this circuit. But it says: Consistent with federal law. That's 21.001.

PHILLIPS: Why would you have us read that that's this particular circuit?

CARR: Because if you don't, you have forum shopping. Obviously the US SC can trump the Fifth Circuit, but until they do - if you go into federal court under Title Seven in Texas, if this case had been brought in other words under Title Seven, it would have been thrown out of court by Judge Hudspeth out in El Paso.

PHILLIPS: What do you have to show that that statutory language, that the concern was forum shopping rather than the concern was that we're directing a law modeled after the federal law, and we want our courts to have a body of law to look to?

CARR: I don't see much of a dichotomy between those two. The reason they wanted you to look at the federal law was so that it would be interpreted consistently. And it seems to me that that's what you need to do, and that's what the legislature clearly directed.

On the language of 21.0055, that statute again says: An employer...commits an unlawful employment practice...if the employer retaliates or discriminates against any person who under this chapter (don't overlook that phrase 'under this chapter') opposes a discriminatory practice. And on page 3 of her brief, the respondent makes it very clear that she is opposing a discriminatory employment practice at SLA. But that can't by definition be an opposition under this chapter because SLA's not covered by this chapter. This chapter being TCHRA. So even if you look at 21.055, and even if you say 'person' is intended to be interpreted differently from 704(a), and I don't concede that, you still don't have an opposition to an employment practice under this chapter, because that's the statutory language even under 21.055.

I would also point out that the CA's decision makes it very clear that their decision is absolutely based on *Sibley*. And they concluded, I think wrongly, that by relying on *Sibley*, they would get the state law in accordance with federal law. At page 7, of their decision, they say: We believe that by applying the *Sibley* doctrine here, we are synthesizing federal and state common law by recognizing an established federal common law exception to the general rule, that is not in fact true. Consequently, persons bringing causes of action under state law are afforded the same protections that they would enjoy under the federal law. They understand the rationale, and the reasoning behind the statutory instruction to follow federal law. They just got it wrong on *Sibley*. And the next to the last sentence of their opinion says: Because we hold the *Sibley* doctrine controls, we find the trial judge erred in granting the hospital's motion for summary judgment.

ABBOTT: What is the significance of the *Bender* case?

CARR: We don't think *Bender* changes anything. It says: We assume for the sake of argument that the Fourth Circuit circuit's going to adopt *Sibley*. And then went on to say: But even if it did, it wouldn't help the plaintiff in the case. But they expressly don't adopt the *Sibley* rationale. They say it's just not necessary to decide it.

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RESPONDENT

RICHARD: Justice Abbott, the significance of *Bender* is, and this also would answer Justice Hankinson's question as well, is *Bender* makes it clear that every circuit court that has addressed the *Sibley* doctrine issue has adopted it.

Mr. Carr made the statement about the *Spirety(?)* case of changing *Sibley*. I would submit to the court that if you would look at cases that we have cited: In the 1st circuit, *Carparts v. Automotive Wholesalers Assn.*; the 2nd circuit, *Spurk v. Teachers Insurance Annuity*; the

6th circuit, *Christopher v. Stouder*; the 9th circuit, *Gomez v. Alexum(?) Brothers*; *Mitchell v. Frank R. Howard Memorial Hospital*; *Lutcher v. Musicians Union Local;* these are all circuit court opinions that came after the *Spirety(?)* case; the 11th circuit, *Pordazy v. Coleman,* they are all cases that have held that the *Sibley* doctrine is applicable and it is applicable to a case that...

HANKINSON: But even in *Sibley,* the court acknowledged that there must be at least a nexus. I mean there is a control element. It is not just anyone off the street who happens to employ 15 people.

RICHARD: Absolutely.

HANKINSON: Isn't then, as a result of that, these other circuit cases and *Spirety* actually just a refinement of the fact of how you define the control or the nexus?

RICHARD: Let me just say that *Diggs* made this statement: There must be some nexus with an employment relationship for Title Seven to apply, but the connection need not necessarily be direct. Margaret Rennels had a relationship.

HANKINSON: I understand that. So your position though, as I understand it, is that there need not be any employment relationship. And my question to you is, that even starting with *Sibley,* there is a nexus and control requirement that the federal courts have refined over the last 25 years. So now in fact, the Fifth Circuit talks in terms of an employment relationship, but it's not the classic direct employment relationship. They are talking about the control and economic realities.

RICHARD: Out position has never been that Margaret Rennels does not have to have an employment relationship. She has an employment relationship with Sierra Laboratory Associates. She was a pathologist employed by that group.

HANKINSON: But your position is is that she need not have any employment relationship if we call it indirect or whatever under any test with respect to the defendant that she's suing under the Act?

RICHARD: I would take the position then and it's set forth in the *Bender* case, and this by the way provides the protection that people have expressed in the amicus briefs about concern about expanding litigation, that there be a defacto relationship, an indirect relationship. And I will show in a moment why that is in the case.

HANKINSON: And is the indirect relationship this hybrid economic realities common law control test that the Fifth Circuit and a lot of the other circuits are applying?

RICHARD: It doesn't have to be all of those criterias. Although, I will show you in a moment most of them are present with regard to Margaret Rennels and Sierra Medical Center.

HANKINSON: Before we get to the application though, is it a fair statement that federal law generally does use some version of the economic realities control test in looking at the relationship between the plaintiff and the defendant in a Title Seven case?

RICHARD: If you're going to try to establish direct employment - as direct employment verses independent contractor. But if you're showing that there's been interference by a third-party, I believe all that is necessary is to show that you have a common law agency relationship. Margaret Rennels clearly had that relationship with Sierra Laboratory Associates, and Sierra Medical Center interfered with that relationship.

HANKINSON: Explain that to me further, please?

RICHARD: She is an employee of Sierra Laboratory Associates. Sierra Medical Center exerts certain control over that relationship. The control they had was that she had to be a specialist in pathology. She had to work certain hours. They had coverage 24 hours a day, 7 days a week, 52 weeks a year. She could not work for any other group. She could not see any other patients. She could not get a substitute for her position by going out and just asking somebody to cover for her. The hospital had to approve it. She could not have ownership in Sierra Laboratory Associates without the approval of Sierra Medical Center, which is the quintessential statement of control.

HANKINSON: But aren't you then evaluating the relationship between the medical center and her under this hybrid test, isn't that what you're really doing?

RICHARD: What I am saying to you is, that a certain amount of control has been demonstrated and is demonstrated by Sierra Medical Center over her.

HANKINSON: I understand. But in order for us to understand the legal significance of that control, we have to know what legal test we should be looking at. And what I've heard you say is that you're claiming that we should be looking as to the medical center and Dr. Rennels and looking at the amount of control that exist and the economic realities of that circumstance. And isn't that they hybrid test that has evolved from *Sibley*?

RICHARD: The hybrid test is a test that's been applied when someone's trying to show a direct employment relationship. That's not what *Sibley* is about. *Sibley* is about showing an indirect or a defacto employment and that someone, another employer is exerting control over that employee of another employer's access to the job market. And that's what *Sibley* is attempting to do.

Another statement, which I think is significant from *Diggs*, and I would ask the court to simply read the *Diggs* case, because the *Diggs* case supports Margaret Rennels in this case. And the *Diggs* court said this: Diggs was not employed (she is a black female doctor) nor did she seek employment by a professional association. She tried to show that she had an employment relationship with her patients. Whereas, in our case, Margaret Rennels was employed by a

professional association, Sierra Laboratory Associates. And what the Fifth Circuit in *Diggs* was saying is, that we would recognize a situation like *Sibley*. They didn't have to get to *Sibley* in *Diggs,* because they could state, and I think accurately did, that you cannot argue that that relationship between patient and doctor is an employee/employer relationship. So you don't have an interference with that employment relationship.

BAKER: What is the claim against NME that you're asserting here that there are fact issues about?

RICHARD: The claim that we've asserted is that in October 1993, Sierra Medical Center was on notice that Margaret Rennels was opposing a discriminatory practice, sex discrimination in her employment. They were on notice of that. And over the course of the next several months that followed there was various contacts between Mark Fry and the head of the pathology department that Margaret Rennels worked for. And in those communications, he expressed his dissatisfaction. She had this claim pending. Things of that nature. And basically, it culminated on April 4, 1994, Mark Fry goes in to Judy Pester, who is one of the shareholders in Sierra Laboratory Associates, and says: I don't plan to have Margaret Rennels as a partner in Sierra Laboratory Associates. I want your help to see to it that that doesn't happen. And she says: I will do whatever it takes. At the time that they had that conversation, the paperwork to make her a shareholder had already been started. The employment agreement that she was supposed sign, all the things that would continue her employment at Sierra Laboratory Associates were in progress. When Mark Fry makes his statement it all stopped.

BAKER: Is it correct then, that the basis of what's left in the lawsuit as far as NME is concerned is conspiring with the laboratory to continue the sexual discrimination in the face of that complaint?

RICHARD: In retaliation against her for having opposed the discriminatory practice.

ENOCH: Going back to this nexus issue. If I understand your position, if I just happen to be a friend of an individual employing Mrs. Rennels, and I just tell my friend: I don't think you ought to employ Ms. Rennels; I don't like the looks of her hair, or whatever, whatever basis I have. Let's assume it's some sort of discriminatory basis that's otherwise prohibited. But as you say SLA itself has less than 15 employees, so there's no direct liability for them to discriminate. But you're saying the mere fact that I've interfered with that relationship when she is fired subjects me to this TCHRA complaint?

RICHARD: Not at all, because I believe that the evidence is clear that there has to be a relationship - there has to be a certain amount of control that is being exerted by the person that's doing the interfering.

ENOCH: In the nature of some sort of employment relationship?

RICHARD: Well they have to be able to control access to employment opportunities. Clearly, Sierra Medical Center had that kind of control over Margaret Rennels.

ENOCH: I might control the access to employment opportunities with my good friend. I mean I was kind of confused with your answers to Judge Hankinson. You are arguing that you don't need any sort of employment type nexus, but on the other hand you're saying you have to have some sort of employment type nexus with this individual?

RICHARD: The employment type nexus is that there has to be a relationship of employment. In our case, Margaret Rennels, Sierra Laboratory Associates...

ENOCH: That's part of the hypothetical.

RICHARD: And what I'm saying is, the Fifth Circuit made this statement: There must be some nexus with an employment relationship for Title Seven to apply, but the connection need not necessarily be direct. She doesn't have to be the employee of Sierra Medical Center in order to pursue this claim.

ENOCH: And that's my point. So, I happen to be an employer. I am one of the 15 employees. I just happen to be a good friend of who heads up Sierra Laboratory and I just tell them: I don't think you ought to hire Reynolds and they don't. So I am liable under TCHRA for this violation. Or is there something more in terms of my relationship to Rennels that's necessary for there to be this nexus of indirect relationship?

RICHARD: Two things: 1) you have to be an employer subject to the Act; so you would have to have more than 15 employees; so if you're just an individual who comes in and gives your opinion, you're not subject to the Act; 2) I believe that the case law that has interpreted the *Sibley* doctrine and the *Bender* case is a good - very recent statement of it says: That there has to be a relationship - you have to show that there's some kind of control that can be exercised. In this situation, Sierra Medical Center had the ultimate control. They could say whether or not Margaret Rennels could be an employee, and did. And she no longer was an employee after that.

The *Bender* opinion does make the statement - it articulates in the opinion that there has to be that type of a relationship. There has to be some kind of control that could be - that's the safeguard for you Justices about the concern from the amicus briefs.

Basically what we have is this, if the court adopts the position that's being advanced by the petitioner, then Sierra Medical Center could go out and place a sign in front of the hospital that says: We don't allow female doctors in our pathology department, in our radiology department, in our emergency room. And have no consequence for it. And no physician group is going to hire a female doctor and risk losing that lucrative exclusive contract. And if they did hire a female doctor, then that doctor could be fired at the insistence of Sierra Medical Center and there

would be no recourse. Ladies and gentlemen that's not the law, and it should not be the law.

The statute is clear, you do not have to be a direct employee of the employer who's subject to the Act. It's clear with regard to the...

BAKER: I gather then, you would say that the actual employer, in this case SLA, doesn't have to be subject to the Act?

RICHARD: No they do not have to be subject to the Act. One other point about showing that this direct employment is not required, is the situation with regard to Title Seven saying: Any individual. Title Seven for the person who can make a complaint, is the person aggrieved(?) It doesn't say employee. In *Sibley,* said: That if the remedy is for a class that is broader than the direct employees and there's a strong indication that the prescriptions of Title Seven reach beyond the immediate employee/employer relationship. And you will find that the language that I'm talking about parallels. In TCHRA it says: The person aggrieved can bring the complaint.

BAKER: But even under the factual circumstances here you're still agreeing, as I understand, with Justice Hankinson's questioning that some aspect of control is necessary even in the indirect situation that exist here?

RICHARD: I believe that there should be some - you in essence become an indirect or defacto employee. I believe some control is there and...

HANKINSON: Isn't that that hybrid test? Isn't that what's applied in the absence of a direct relationship?

RICHARD: They want to apply the hybrid test to say that there is no employee...

HANKINSON: Well I understand in terms of application. But just looking at your legal test how do we determine the amount of control? Isn't that where the Fifth Circuit and a lot of the other federal courts have used this hybrid control test?

RICHARD: They've always used the hybrid test whenever the issue was employee verses independent contractor where you're just making a direct employment claim. In instances where the person...

HANKINSON: But in *Deal,* that involved an insurance company and the agent. There was never any contention that in fact the agent who was suing was directly employed by State Farm. The question was whether or not State Farm had enough control over the test to rise to the level of this indirect defacto employment relationship under the test the Fifth Circuit applies so that Title Seven could be applied. Am I missing the boat?

RICHARD: In *Deal,* there never was an attempt to say: Hey, State Farm is an indirect employer and State Farm interfered with my employment with Mr. Hunt. That never was argued, because it couldn't be argued. State Farm didn't do anything like Mark Fry did and Sierra Medical Center when he comes in and demands that some...

HANKINSON: We keep going back to facts, and I'm just trying to clarify where you are on the law. The way I read *Deal*, we have this woman who ends up suing the agency she worked for and State Farm, and she tried to make a Title Seven claim against State Farm for interfering with her relationship, right?

RICHARD: No, she tried to make a claim against State Farm as a direct employee/employer relationship. She tried to say that State Farm was her employer directly. *Sibley,* is never mentioned in that case.

HANKINSON: And didn't she do that because of *Fields* in which the Fifth Circuit had decided that the amount of control was going to be this hybrid test?

RICHARD: True again if it's an employee/employer direct employment claim. But not a *Sibley*. *Sibley* wasn't mentioned in *Fields*. It wasn't mentioned in *Deal*. To distinguish for you *Sporidy(?) v. Reinhart* case, first of all it's a 1979 case and all those cases I mentioned a moment ago that applied *Sibley* were after that case. But the other point about it is, the issue was employee verses independent contractor. There was never an issue in that case about a third-party employer interfering. That also considered a 1972 amendment to the Civil Rights Act, and that amendment applied to federal employees, and the amendment said: That you had to have actions affecting employees or applicants for employment. It is different than the Civil Rights Act which talks about individuals and persons.

ENOCH: You now agree - in fact you agree with Mr. Carr's position that Mrs. Rennels isn't even arguing she's an indirect employee of NME. He mentioned that in his argument that you're not arguing that she's even an indirect employee of NME. Do I understand you now to be saying that's correct?

RICHARD: No. I would argue that she demonstrates that there was a significant amount of control by Sierra Medical Center enough to make the statement that she's an indirect or defacto employee.

ENOCH: Judge Hankinson's been asking you what is the standard for determining whether indirect employee, and you said: well that's not relevant here. We're not talking about direct employee or indirect, we're talking about something else. Mr. Carr has said, that Ms. Rennels has conceded that she is not trying to establish either a direct employee or an indirect employee relationship. And from your argument I understand you to be saying that *Sibley*, all the Fifth Circuit in *Sibley* tests and *Deal* have all gone to whether or not there was an employment relationship direct

or indirect, so you're not using any of that?

RICHARD: No. What I am saying is, that Margaret Rennels had - she had a direct employment relationship with Sierra Laboratory Associates. No question about that.

ENOCH: We're not arguing about that.

RICHARD: And all I'm saying is, to provide the safeguards that you're looking for...

ENOCH: Are you saying she has an indirect employment relationship with NME, that's all I am asking?

RICHARD: I believe she does.

BAKER: How does that arise?

RICHARD: Because of the control that NME exerts over her employment.

BAKER: Is this more like a traditional independent contractor situation in determining whether a third-party exercises control over an independent contractor to the extent that there's going to be responsible for their bad acts? Is that what you're talking about? In other words, it has nothing to do with being an indirect employee. It just has to do with control of a company over an independent contractor that works in their facility.

RICHARD: All I am saying is that the *Sibley* doctrine relies upon the ability of one employer to control an employee of another employer's access to the job _____.

BAKER: But you used the word employer because it's defined in the Texas Act, and you could use any other, you can use a general contractor over an independent - you could still - what I am trying to get to are the legal theories that you're talking about have to do with exercising control that makes a person responsible for their acts to that employee from somebody else? Or are you just going on *Sibley* and that's it?

RICHARD: Well I am going on *Sibley*. And if you look at *Sibley,* you will find that there has to be that kind - there has to be an employment relationship that's interfered with. And I believe we've shown that. And I believe that to satisfy any concerns that the court has about having all kinds of litigation, that the *Bender* case is telling you that there has to be a certain amount - a defacto or indirect employment. And I think we've met that.

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REBUTTAL

CARR: I think it is highly instructive that until Justice Hankinson forced Mr. Richard to do so, he studiously avoided citing any Fifth Circuit case more recent than 1988, that's the *Diggs* case. In *Diggs,* the Fifth Circuit expressly stated they weren't reaching the controlling question in this case. They said: Even if we were to hold the Paris Hospital could violate the provisions of Title Seven by interfering with Digg's relationship with a third-party, a question we do not reach that relationship would have to be an employment relationship. But sense then, and Mr. Richard is very eager to rely not on that language but at least other portions of *Diggs*. But he has totally ignored *Fields*, *Deal*, and *Bloom*. *Bloom* in fact never came up. but *Bloom* in 1997 says: *Sibley* is contrary to the precedent of the Fifth Circuit. I don't see how that could be stated any more clearly.

One of the cases Mr. Richard cited in support of his position is *Carparts*. The Fifth Circuit expressly said: We don't accept *Carparts*. It's relying on *Sibley*, that's not the law in this circuit.

OWEN: If we accept the law as articulated by other circuits, not the Fifth Circuit, do you lose?

CARR: We could lose depending on which circuit you adopted and to which you extended it. But to do so, I would respectfully submit, that absolutely opens up forum shopping questions and it accomplishes what the legislature said: Don't do. And that is, get different results depending on whether a plaintiff sues under Title Seven or under TCHRA. That language is not there in haec verba, I concede. But what other purpose did they have in the very first provision of the entire Act, which is 21.001(1), when they directed the Texas courts to interpret the law consistent with federal law.

OWEN: Isn't our job to more or less guess what the US SC would say federal law is and necessarily follow the Fifth Circuit unerringly?

CARR: I would respectfully say, no, that is not your responsibility. Where the Fifth Circuit has clearly defined the law, and they have, and where the SC has cert denied at least two of those three cases that we've relied on, it would be improper for this court to reach a different result. If some 5 years from now the US SC reaches a different result, then I think that would change the law in Texas. But the law today that you should follow, I would respectfully submit, is the Fifth Circuit law.

PHILLIPS: If it weren't for that provision about federal law, and if we were just looking at the facial language of this statute, wouldn't you lose?

CARR: No. I would respectfully suggest that we would still prevail. There are 4 subparts in 21.055. There are 4 things that a covered employer can't retaliate for. The last three clearly have no application to this case, because the plaintiff has made a charge or filed a complaint or testified. Because first of all, the only one that would ever apply in this case is filing a charge, and

that was done in May 1996, and the alleged retaliation by Mr. Fry was on April 4, 1996. So it can't possibly have been done because she filed a charge. So the only one that she can possibly rely on is because she has opposed a discriminatory practice. But to do that, she must show that she has opposed a discriminatory practice under this chapter that is under TCHRA, and opposing discrimination by Sierra Laboratory Associates is not opposing discrimination under this chapter because Sierra Laboratory Associates is not covered by the chapter.