IN THE SUPREME COURT OF TEXAS

NO. 96-0194

THE TEXAS MEXICAN RAILWAY COMPANY, PETITIONER

v.

LAWRENCE P. BOUCHET, RESPONDENT

ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

Argued on November 21, 1996

JUSTICE SPECTOR, concurring and dissenting.

Instead of giving a remedial statute a comprehensive and liberal construction, as our caselaw requires, the majority concludes that the Anti-Retaliation Law, former article 8307c, protects only employees of workers' compensation insurance subscribers. I concur in the majority's judgment, but I cannot join its opinion. The majority's construction of the Anti-Retaliation Law is contrary to sound statutory construction principles and undermines the Legislature's policy of encouraging participation in the workers' compensation system.

I.

Lawrence Bouchet initially sued his employer, the Texas Mexican Railway Company, under the Federal Employers Liability Act, 45 U.S.C.A. §§ 51-60 (West 1986 & Supp. 1997), and the Safety Appliance Act, 49 U.S.C.A. §§ 20301-903 & 21301-04 (West 1997). Bouchet alleged that he was injured as a result of the railway's negligence while he was acting in the course and scope of his employment. After he sued, the railway reduced certain benefits that it had been providing. Bouchet then amended his petition to allege a claim for wrongful retaliation under

article 8307c.[1]

The Court holds today that Bouchet is not entitled to pursue a claim under that statute because his employer was not a subscriber to workers' compensation insurance. Under the majority's view, article 8307c applies only to employees of subscribers to workers' compensation insurance. I disagree. The mere fact that Bouchet's employer was a nonsubscriber does not deprive Bouchet of the protection of the Anti-Retaliation Law.

Article 8307c provides that [n]o *person* may discharge or in any other manner discriminate against any *employee* because the employee has in good faith filed a claim, hired a lawyer to represent him in a claim, instituted, or caused to be instituted, in good faith, *any proceeding* under the Texas Workmen's Compensation Act, or has testified or is about to testify in any such proceeding.

Act of May 7, 1971, 62nd Leg., R.S., ch. 115, § 1, 1971 Tex. Gen. Laws 884 (presently codified at TEX. LAB. CODE § 451.001) (emphasis added). I believe that the precise terminology employed by the Legislature in this statute, under appropriate statutory construction principles, reveals that the majority's narrow construction is erroneous.

The majority considers article 8307c in isolation, without regard to other provisions of the Act of which it was a part at the time it was enacted. In construing a statute, we have warned that "courts must examine the entire statute or act and not merely an isolated portion thereof." *State v. Terrell*, 588 S.W.2d 784, 786 (Tex. 1979) (citing *Calvert v. Texas Pipe Line Co.*, 517 S.W.2d 777 (Tex.1974)). The language of article 8307c, read in context with other portions of the workers' compensation law, strongly suggests a broader application.

At the time article 8307c was enacted, the term "employee" was broadly defined. The term included "every person in the service of another under any contract of hire, expressed or implied,

[1] Article 8307c has since been recodified without substantive change. *See* TEX. LAB. CODE §§ 451.001-003. Because the majority refers to article 8307c, this opinion also focuses on the uncodified statute.

oral or written." Act of March 28, 1917, 35th Leg., R.S., ch. 103, Pt. IV, § 1, 1917 Tex. Gen. Laws 269, 291 (former article 8309, § 1, repealed 1989). The term was not limited to persons employed by workers' compensation insurance subscribers.[2] Although the pre-1989 Act defined the term "subscriber" to mean employers participating in the workers' compensation insurance program, *see id.,* it did not define the term "person." The Legislature's use of the term "person," rather than "subscriber" thus suggests that the Legislature did not intend to exclude nonsubscribers from the Anti-Retaliation Law. *See City of LaPorte v. Barfield*, 898 S.W.2d 288, 295 (Tex. 1995) (noting that the term "person" in the Anti-Retaliation Law is broader than the terms "association," "subscriber," or "employer."). Other provisions of the workers' compensation law strongly reinforce that suggestion.

The majority concludes that "[t]he plain and common meaning of the statute's language provides protection only for claimants proceeding or testifying under the Workers' Compensation Act." __ S.W.2d at __. I do not necessarily disagree with that statement. Where I depart from the majority is in my understanding of what it means to "proceed[] . . . under the Workers' Compensation Act."

At the time the Legislature enacted the Anti-Retaliation Law, the Workmen's Compensation Act governed the rights of employees of *both* subscribers and nonsubscribers. Section 4 of article 8306 of the former Act provided that "[e]mployes whose employers are not at the time of the injury subscribers . . . shall be entitled to bring suit and may recover judgment against such employers . . . for all damages, sustained by reason of any personal injury received in the course of employment." *See* Act of March 28, 1917, 35th Leg., R.S., ch. 103, Pt. I, § 4, 1917 Tex. Gen. Laws 269, 271 (repealed 1989). Section 4 also provided that certain common-law defenses, such as contributory negligence and assumed risk, were not available to employers in the

[2] The present version of the Texas Workers' Compensation Act retains that broad definition. TEX. LAB. CODE § 401.012(a).

suits it authorized.[3] *Id.* §§ 1, 4. The Act not only specifically authorizes suits by employees of nonsubscribers, it largely governs the employer's ultimate liability. *See* David W. Robertson, *The Texas Employer's Liability in Tort for Injuries to an Employee Occurring in the Course of the Employment*, 24 ST. MARY'S L.J. 1195, 1199 (1993) ("The unavailability of the contributory negligence defense means that an employer whose fault, however slight, was a proximate cause of the [employee's] injuries will owe full damages, notwithstanding any perception that the injured employee was also at fault in a way that was a proximate cause of the injuries."). Accordingly, an employee suing a nonsubscribing employer to recover damages for an on-the-job injury is "proceeding . . . under the Act." The legislative history cited by the majority must be viewed in the context of the full range of remedies that was available under the Act at the time the Legislature enacted the Anti-Retaliation Law, including the right to pursue a common-law claim.

The majority's narrow construction of article 8307c contravenes the fundamental principle that requires courts to broadly construe remedial statutes. *See Burch v. City of San Antonio*, 518 S.W.2d 540, 544 (Tex. 1975); *City of Mason v. West Tex. Utils. Co.*, 237 S.W.2d 273, 280 (Tex. 1951). "If a statute is curative or remedial in its nature, the rule is generally applied that it be given the *most comprehensive and liberal construction possible*." *City of Mason*, 237 S.W.2d at 280 (emphasis added). The majority acknowledges the statute's remedial purpose. __ S.W.2d at __. Nevertheless, the majority gives the statute the narrowest possible effect. In my view, that construction is erroneous in light of the statute's broad language and context.

The majority's error is particularly significant because the construction it imposes on the statute undermines the Legislature's intent to encourage participation in the workers' compensation insurance program. *See* Act of March 28, 1917, 35th Leg., R.S., ch. 103, Pt. I, §§ 1, 4, 1917 Tex. Gen. Laws 269, 271 (repealed 1989) (preserving common-law remedies of nonsubscribers'

[3] The current Workers' Compensation Act contains similar provisions limiting the common-law defenses available to nonsubscribers and establishing the employee's burden of proof. *See* TEX. LAB. CODE § 406.033.

employees and eliminating certain common-law defenses); Robertson, *supra*, at 1199 (noting that the loss of the common-law defenses of assumed risk, contributory negligence, and fellow servant is a significant penalty for nonsubscription). As a result of the majority's decision, subscribing employers are subject to anti-retaliation suits, while nonsubscribers face no penalty for discharging or discriminating against workers who seek compensation for on-the-job injuries.

I would hold that a worker who files a claim against a nonsubscribing employer to recover damages for an on-the-job injury is entitled to sue under article 8307c.

II.

Despite my strong disagreement with the majority's opinion, I concur in its judgment. I base that conclusion , however, on totally different grounds. I would hold that Bouchet was not entitled to sue under article 8307c because his FELA lawsuit against the railway was not a claim under the Act.

At the time Bouchet filed this lawsuit, employees of "a person covered by a method of compensation established under federal law" were not subject to the Act. TEX. LAB. CODE § 406.091(a)(2). Bouchet filed his lawsuit under FELA, 45 U.S.C. §§ 51-60. That federal law provides that common carrier railroads engaged in interstate commerce "shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of the officers, agents, or employees of such carrier." 45 U.S.C. § 51 (West 1986). Under section 53 of FELA, an employee's contributory negligence does not bar recovery, although it does reduce the damages recoverable. *Id.* § 53. FELA thus establishes a "method of compensation . . . under federal law." FELA, and not the Texas Workers' Compensation Act, authorized Bouchet's lawsuit and governs the extent of his employer's liability. Accordingly, Bouchet's lawsuit did not assert a claim under the Texas Workers' Compensation Act.

III.

In light of the Anti-Retaliation Law's language and context, the majority errs in holding that the statute does not protect employees of nonsubscribers. I concur in the majority's judgment, however, because Bouchet's suit arose under FELA, not the Texas Workers' Compensation Act.

Rose Spector
Justice

OPINION DELIVERED: February 13, 1998