No. 02-10-00052-CV

IN THE

Court of Appeals

FOR THE SECOND COURT OF APPEALS
FORT WORTH, TEXAS

TARRANT REGIONAL WATER DISTRICT,

Appellant,

v.

TAMARA VILLANUEVA,

Appellee.

ON ACCELERATED APPEAL FROM THE 342ND DISTRICT COURT OF
TARRANT COUNTY, TEXAS
THE HONORABLE BOB MCGRATH PRESIDING

Brief of Appellee, Tamara Villanueva

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Recommendation on Oral Argument

TRWD didn't request oral argument, and it's not necessary. The appeal concerns just one issue of law. The record is complete, and it is not an issue of first impression. This appeal can be decided on the briefs alone; oral argument would not significantly aid the court's decisional process.

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Issues Restated

TRWD's brief presents two issues:

1. Whether the Texas Commission on Human Rights Act ("TCHRA") should be read to automatically incorporate into its provisions a Congressional amendment to Title VII known as the Lilly Ledbetter Fair Pay Act of 2009 without the necessity of a corresponding amendment to the TCHRA by the Texas Legislature?

2. If the Ledbetter Act does not apply to claims under the TCHRA, whether the trial court lacked jurisdiction over Villanueva's gender discrimination claim under this Court's holding in *Cooper-Day v. RME Petroleum Co.*, 121 S.W.3d 78 (Tex. App. – Fort Worth 2003, pet. denied)?

Villanueva restates TRWD's two issues as one:

Timeliness. An employment discrimination claim under the Tex. Lab. Code § 21.202(a) must be filed no later than 180 days after the unlawful practice occurred. Villanueva filed her administrative charge just 70 days after receiving her last discrimination-affected paycheck. Did she timely file the charge?[1]

[1] Tex. R. App. P. Rule 38.2(a)(1)(B).

Statement of Facts

Tamara Villanueva was working as a Senior Buyer in TRWD's purchasing department when she was fired in July 2006.[2] TRWD replaced her with David Owen, an employee from another department, and started him out at $45,000 per year.[3]

TRWD later rehired Villanueva, but as a "newly-created" Contract Administrator, not a Senior Buyer.[4] Her starting salary was $40,000 per year and she reported directly to Owen.[5]

Because of his inexperience, Owen constantly called on Villanueva to do many of his own job responsibilities.[6] Despite performing substantially the same work that he did, his salary always outstripped hers.[7] By November 2007, she was making at least $6,000 less per year than Owen.[8] When she complained about it to management, TRWD pulled her off a major project, took away many of her most important job responsibilities, and filled her day with menial clerical tasks.[9]

Four months later, TRWD reassigned her to a Buyer II position and moved her to its warehouse.[10] There, she was forced to do heavy manual labor, work that was debilitative

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[2] CR 3.

[3] CR 3-5.

[4] CR 3, 12.

[5] CR 5.

[6] CR 4-5.

[7] *See* CR 5.

[8] CR 5, 26.

[9] CR 5-6.

[10] CR 6.

on her knees because she has bilateral joint disease.[11] A month and a half later, she asked to be reinstated as a Contract Administrator after her doctor said that she couldn't continue that kind work anymore.[12] TRWD fired her instead, saying that it didn't have any other positions open.[13]

She received her last paycheck on 6 June 2008 and filed a charge of gender discrimination just 70 days after receiving it.[14] She filed this action 16 days after being issued a right-to-sue letter.[15]

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[11] CR 6.

[12] CR 6.

[13] CR 6.

[14] CR 7, 67, 69-70.

[15] CR 7, 71.

Summary of the Argument

In *Cooper-Day v. RME Petroleum Co.*,[16] this court held that Tex. Lab. Code § 21.202(a)'s 180-day limitation period was triggered when the employee first learned of the discriminatory employment decision. The court arrived at that conclusion by relying on substantive federal law construing Title VII.

Title VII has been amended. Now a discriminatory employment practice occurs not only when a discriminatory decision is made, but also when that decision affects the employee, including each time he receives a discrimination-affected paycheck.

Villanueva filed her administrative charge 70 days after receiving her last paycheck from TRWD. Applying the same procedural analysis employed in *Cooper-Day*, Villanueva filed her charge timely because she filed it within 180 days of receiving her last paycheck from TRWD—the last time that she was affected by its unlawful discriminatory practice.

[16] 121 S.W.3d 78 (Tex. App. – Fort Worth 2003, pet. denied).

Argument

Timeliness. An employment discrimination claim under the Tex. Lab. Code § 21.202(a) must be filed no later than 180 days after the unlawful practice occurred. Villanueva filed her administrative charge just 70 days after receiving her last discrimination-affected paycheck. Did she timely file the charge?

Lower Court Proceedings

Villanueva filed suit against TRWD, alleging gender discrimination, a violation of Texas Labor Code § 21.051.[17] TRWD filed a partial plea to jurisdiction, arguing that the trial court was deprived of subject-matter jurisdiction over the claim because Villanueva didn't timely file her administrative charge.[18] She responded, arguing that her administrative charge was timely because she filed it 70 days after receiving her last paycheck from TRWD. The court denied the plea and TRWD filed this appeal.[19]

Standard of Review

This appeal's sole issue is whether Villanueva timely filed her administrative charge. In deciding a plea to jurisdiction, this court doesn't consider the merits of the case, but just the plaintiff's pleadings (construed in her favor) and evidence germane to the jurisdictional inquiry.[20] Since the facts of when Villanueva received her last paycheck and when she filed her charge aren't disputed, the standard of review is *de novo*.[21]

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[17] CR 2-10. Villanueva's retaliation claim isn't part of this appeal. *See* TRWD Brief at 6 n. 24.

[18] CR 11-57.

[19] CR 60-72B.

[20] *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002).

[21] *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004).

1. Villanueva timely filed her charge.

TRWD fired Villanueva in July 2006 and replaced her with David Owen, a male employee from another department. The district later rehired her, but just as Owen's subordinate and at a lower salary. Because of his inexperience, Villenueva had to discharge many of his job responsibilities. When she complained to management about the relative disparity in pay between them, TRWD retaliated and eventually fired her on 25 May 2008.

In this suit, Villanueva asserts that TRWD violated Texas Labor Code § 21.051 by discriminating against her gender regarding pay.[22] As a prerequisite to suit, she had to file an administrative charge[23] within 180 days after TRWD's discriminatory action occurred.[24] Filed timely, the trial court may entertain jurisdiction over her gender-discrimination claim.[25]

Section 21.202(a) of the Labor Code speaks of a 180-day limitations period, but it doesn't state when an unlawful employment practice occurs;[26] the trigger point for limitations is undefined.[27] The Texas legislature drafted the code this way so courts could flexibly correlate state law with federal substantive law in implementing Title VII's policies

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[22] CR 7-8.

[23] Tex. Lab. Code § 21.202(a); *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 482, 488 (Tex. 1991).

[24] *Id.*

[25] *See Davis v. Autonation USA Corp.*, 226 S.W.3d 487, 491 (Tex. App. – Houston [1st Dist.] 2006, no pet.) (citing *Schroeder,* 813 S.W.2d at 486).

[26] *See* Tex. Lab. Code § 21.202(a).

[27] *See Klebe v. University of Texas Sys.*, 649 F. Supp. 2d 568, 571 (W.D. Tex. 2009).

in state discrimination cases.[28] Thus, Texas courts have looked to federal law in deciding when an unlawful employment practice occurs—when the limitations clock starts ticking.[29] Ergo, in *Specialty Retailers,*[30] when the Texas Supreme Court faced the question of when an unlawful employment practice occurs under section 21.202(a), it didn't contrive an idiosyncratic definition, but looked to the federal courts' construction of Title VII to decide the question.[31] When it held that the limitations period starts when the employee first gets notice of the discriminatory employment decision, it did so, by relying on *Delaware State College v. Ricks*'s construction of Title VII's own occurrence language.[32]

This court performed the very same kind of procedural analysis in *Cooper-Day v. RME Petroleum Co.*[33] when it answered how the limitations period is triggered in unequal pay claims. In *Cooper-Day*, Charlene Cooper-Day worked as a landman for Union Pacific Railroad.[34] In April of 1997 and 1998, she received a couple of pay raises.[35] She resigned in May 1998 and filed an administrative charge that November, claiming discrimination in her pay.[36] Relying on both *Specialty Retailers* and *Ricks*, this court held that her limitations

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[28] *See* Tex. Lab. Code § 21.001(1); *Autozone, Inc. v. Reyes*, 272 S.W.3d 588, 592 (Tex. 2008) (citing *Ysleta Indep. Sch. Dist. v. Monarrez*, 177 S.W.3d 915, 917 (Tex. 2005)).

[29] *Prairie View A&M University v. Chatha*, No. 01-09-00840-CV, 2010 Tex. App. LEXIS 2318, at *5 (Tex. App. – Houston [1st Dist.] April 1, 2010); *see also Autozone*, 272 S.W.3d at 592 (Texas courts may look to federal law in in interpreting the Texas act's provisions).

[30] *Specialty Retailers, Inc. v. DeMoranville*, 933 S.W.2d 490 (Tex. 1996).

[31] *Id*. at 492-93.

[32] 449 U.S. 250, 257-58 (1980).

[33] 121 S.W.3d 78 (Tex. App. – Fort Worth 2003, pet. denied).

[34] *Id*. at 81-82.

[35] *Id*.

[36] *Id*. at 82.

period began when she first learned of her pay disparity—the day she got her raises.[37] Consequently, she had missed the limitations window. When she argued that her discrimination-ladened paychecks represented a continuing violation (with her last check bringing her within the 180-day period), this court again looked to federal substantive law construing Title VII's occurrence language, found it didn't support her theory, and affirmed UPR's summary judgment on limitations.[38]

Since *Cooper-Day*, Congress amended Title VII's substantive law, changing the parameters of when an unlawful employment practice occurs for unequal pay claims.[39] Under the Ledbetter Act, an unlawful employment practice occurs, not only when a discriminatory compensation decision is made, but also when the victim of that decision is affected by it, including each time his employer cuts him a wage check tainted by that decision.[40] Congress made the amendment retroactive to 28 May 2007.[41]

Applying the same procedural analysis used in *Specialty Retailers* and *Cooper-Day*, Villanueva didn't miss section 21.202(a)'s limitations window. TRWD fired her on 25 March 2008 and she filed her administrative charge 70 days after receiving her last paycheck—the last time she was affected by TRWD's discriminatory decision. Given that

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[37] *Id*. at 85.

[38] *Id.* (citing *Celestine v. Petroleos de Venezuella SA.*, 266 F.3d 343, 352 (5th Cir. 2001); *Hendrix v. City of Yazoo City*, 911 F.2d 1102, 1103-05 (5th Cir. 1990); *Krough v. Cessford Constr. Co.*, 231 F. Supp. 2d 914, 921 (S.D. Iowa 2002)).

[39] *See* 42 U.S.C. § 2000e-5(e)(3)(A) (Lexis Nexis Supp. 2009).

[40] *Id*. (unlawful employment practice occurs "when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid . . .").

[41] *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 11-2, 123 Stat. 5 (2009) (act applies retroactively "as if enacted on May 28, 2007," and applies to all claims of discrimination . . . pending on or after that date"); *see Bush v. Orange County Corrections Dept.*, 597 F. Supp. 2d 1293, 1295 (M.D. Fla. 2009) (Title VII claims no longer time-barred though demotions and pay reductions occurred 16 years before EEOC charge filed).

her claim was filed after 28 May 2007, it was timely and the trial court enjoys jurisdiction over her discrimination claim.

2. Procedural precedent calls for the new definition.

The First Court of Appeals recently faced this issue and reached the same conclusion: the Ledbetter Act changed § 21.202's occurrence date to include when a person is affected by the application of the discriminatory act. In *Prairie View A&M University v. Chatha,*[42] Dijit Chatha filed an unequal pay claim after receiving a right to sue letter from the EEOC.[43] She was a professor at the university and had been promoted to full professor in 2004.[44] In 2006 she filed a complaint with the EEOC and followed that with an unequal-pay suit, complaining that she was paid comparatively less than less qualified faculty members.[45] The university responded with a plea to jurisdiction, arguing that since the discriminatory decision occurred in 2004 (her promotion), she hadn't filed her charge in time and, thus, the trial court was deprived of jurisdiction to consider her claim.[46]

Finding the university's arguments against "automatic incorporation" of Congress's amendment unpersuasive, the court concluded that the amendment should be applied to

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[42] *Prairie View A&M University v. Chatha*, No. 01-09-00840-CV, 2010 Tex. App. LEXIS 2318 (Tex. App. – Houston [1st Dist.] April 1, 2010).

[43] *Id.* at *2.

[44] *Id.*

[45] *Id.*

[46] *Id.*

her unequal pay claim.[47] In its analysis, the court observed that Texas courts have looked to federal courts' interpretations of Title VII for guidance in deciding when an unlawful employment practice occurs.[48] For instance, it acknowledged *Cooper-Day*'s holding that that each paycheck wasn't part of a continuing discrimination violation, giving the employee a new limitations period.[49] But it also observed that the *Cooper-Day* court had looked to substantive federal law to reach that conclusion.[50]

It concluded that the Texas act's architecture—Texas courts are to look to federal substantive law of Title VII to construe the Texas act's provisions—and the state's stated policy to execute Title VII's own policies, required application of Title VII's new substantive definition of occurrence.[51] The court was also persuaded that it should follow the course of procedural precedent because two federal district courts had already faced the same question, had applied the same procedural analysis, and had reached the very same conclusion.[52]

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[47] *Id*. at *9, *12-14. *Compare* TRWD Brief at 22-33 (TCHRA's general purposes provision shouldn't be read as an "automatic incorporation" provision).

[48] *Id*. at *5.

[49] *Id*.

[50] *See id*. at *6 (citing *Cooper-Day v. RME Petroleum Co.*, 121 S.W.3d 78 (Tex. App. – Fort Worth 2003, pet. denied) and its citations to *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1997); *Huckabay v. Moore*, 142 F.3d 233 (5th Cir. 1998); *Hendrix v. City of Yazoo City, Miss.*, 911 F.2d 1102 (5th Cir. 1990).

[51] *Prairie View*, 2010 Tex. App. LEXIS 2318, at *11-12 ("now we must apply the substantive law in Title VII that provides a new definition for determining when an unlawful employment practice occurs").

[52] *See Klebe*, 649 F. Supp. 2d at 570-71 (*Ricks* is no longer a correct statement of the law after the adoption of the Act); *Lohn v. Morgan Stanley DW, Inc.*, 652 F. Supp. 2d 812, 829 (S.D. Tex. 2009) (approving of the analysis in *Klebe*).

3. Cooper-Day's discrete-act holding has been superseded.

TRWD argues that *Cooper-Day v. RME Petroleum*'s bare holding—§ 21.202's limitations period begins when the discriminatory decision is first made—should be reaffirmed, but it ignores the path that the court took to reach that holding. As noted above, in deciding that the limitations period for Cooper-Day's unequal pay claims began when she first learned of her lower base pay, the court didn't cut its holding out of whole cloth, but expressly relied on the procedural analysis and substantive construction of Title VII in the *Specialty Retailers* and *Ricks* cases. Since *Ricks* decided that Title VII's occurrence began with the date of the alleged unlawful employment practice because "that was the choice that Congress had made," it could be said that *Cooper-Day's* holding was tethered to Congress's choice too.

With the Ledbetter Act, Congress implemented a new substantive definition of occurrence. If this court sought to reaffirm *Cooper-Day's* bare holding—only a discrete act of the discriminatory decision triggers limitations—it would have to throw off its own procedural analysis (that mirrored the Texas Supreme Court's in *Specialty Retailers*), ignore the mandate to correlate state law with its federal counterpart, and cast a blind eye to the act's purpose to implement the policies of Title VII and its *subsequent amendments*. And it would have to do so without any legislative authority demonstrating a desire to deviate from the amendment.[53]

The better approach, more consistent with the act's express purpose and its architecture, is to recognize that *Cooper-Day's* bare holding has been superseded, but its

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[53] *See Speer v. Presbyterian Children's Home and Serv. Agency,* 847 S.W.2d 227, 233 (Tex. 1993) (Gonzales, J. concurring) ("[F]ederal jurisprudence provides guidance to the interpretations of all sections of the Texas Act unless the Texas Legislature deviated from the language of Title VII.").

procedural analysis hasn't. The court should continue to apply its procedural precedent to interpret the Texas act.[54] The outcome will differ only because of the amendment.

4. TRWD's political arguments haven't any merit.

TRWD's arguments about the Supreme Court's *Ledbetter*[55] case are unavailing because *Ledbetter* is no longer the law; it's been superseded by Congress's amendment.[56] Its arguments about state senator Wendy Davis's efforts to pass a bill are unpersuasive because the courts can't attach any controlling significance to the legislature's failures to enact legislation.[57] How many Republicans didn't like the Ledbetter bill, or what Governor Perry might or might not sign, isn't relevant to the issue raised in this appeal.[58]

Conclusion

Because Congress changed the definition of when an unlawful employment practice occurs and Villanueva filed her administrative charge within 180 days of receiving her last discrimination-tainted paycheck, the trial court's order denying TRWD's partial plea to jurisdiction should be affirmed.

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[54] *See Prairie View,* 2010 Tex. App. LEXIS 2318, at *12 ("Our decision today simply continues to apply that procedural precedent to interpret this undefined term in the Texas Act.").

[55] *Ledbetter v. The Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

[56] *See Prairie View,* 2010 Tex. App. LEXIS 2318, at *8, *9.

[57] *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009) (quoting *Tex. Employment Comm'n v. Holberg*, 440 S.W.2d 38, 42 (Tex. 1969)).

[58] *See Klebe*, 649 F. Supp. 2d at 571 (what the legislature or governor might think "is not a matter the Court be concerned with, as the job of the Court is to interpret the statute as written.").

Dated: 4 May 2010

Respectfully submitted,

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Certificate of Service

I, Peter Smythe, certify that today, 4 May 2010, a copy of the appellee's brief with attached appendix in this case was served upon opposing counsel via facsimile and FedEx, to-wit:

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