

NO. 02-10-00052-CV

IN THE COURT OF APPEALS
FOR THE SECOND DISTRICT OF TEXAS
FORT WORTH, TEXAS

TARRANT REGIONAL WATER DISTRICT,

Appellant,

v.

TAMARA VILLANUEVA,

Appellee.

Appeal from the 342nd District Court of Tarrant County, Texas
The Honorable Bob McGrath presiding

BRIEF OF AMICUS CURIAE TEXAS ASSOCIATION OF BUSINESS

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Rules

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IDENTITY OF INTEREST AND PAYMENT

Pursuant to Tex. R. App. P. 11, the following amicus brief is presented on behalf of the Texas Association of Business (“TAB”). TAB is the leading employer organization for businesses in Texas, representing companies from the largest multi-national corporations to small businesses in nearly every community of our State. The outcome of this case will affect every member of TAB.

The source of any fee paid for the preparation of this brief is TAB. Copies of this brief have been served on all attorneys of record as reflected in the certificate of service.

ISSUE PRESENTED

Whether Chapter 21 of the Texas Labor Code incorporated the Lilly Ledbetter Fair Pay Act?

SUMMARY OF ARGUMENT

In *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), the United States Supreme Court held that in order for a plaintiff to timely file a charge of discrimination based on pay, she has to file the charge within 180 days of when the decision to pay the plaintiff was made—not within 180 days of the last pay check issued. In so doing, the Supreme Court rejected the so-called “paycheck accrual” rule. In response to that decision, Congress substantively changed Title VII of the Civil Rights Act of 1964, as amended (“Title VII”) by adding a new provision that expanded the definition of when discrimination in pay occurs.

In *Cooper-Day v. RME Petroleum, Inc.*, 121 S.W.3d 78 (Tex. App.—Fort Worth 2003,

pet. denied) this Court interpreted the term “occurred” in Chapter 21 of the Texas Labor Code (“Chapter 21”) and held that a plaintiff needs to file a charge of discrimination based on pay within 180 days of when the decision to pay the plaintiff was made—not within 180 days of when the last pay check was issued. That is, this Court rejected the paycheck accrual rule. The Texas Legislature has not changed Chapter 21 since that time.

In this case, the Court should reject the arguments presented by Appellee and instead hold that *Cooper-Day* remains good law and that Chapter 21 does not encompass the paycheck accrual rule. First, while Texas courts look to federal case law interpreting Title VII when they interpret Chapter 21, Texas courts do not do so when the statutes are different. After the Lilly Ledbetter Fair Pay Act (“Ledbetter Act” or the “Act”) was passed, the statutes are no longer similar and should not be interpreted together. There are many different provisions in each statute, and the Ledbetter Act added yet another difference. Therefore, they should not be construed together.

Second, nothing has changed to alter the result this Court reached in *Cooper-Day*. When this Court rejected the paycheck accrual rule, it interpreted Chapter 21 as it existed at that time. Chapter 21 has not changed since then. Therefore, its result should still govern. Any change to the non-analogous provision in Title VII should not affect this Court’s prior interpretation of the unchanged Chapter 21 provision interpreted in *Cooper-Day*.

ARGUMENT

I. THE LEDBETTER ACT SUBSTANTIVELY CHANGED TITLE VII

The history behind the Ledbetter Act was sufficiently set out in Appellant's brief. See Appellant's Br. 17-21. However, neither party directly addressed the effect the Act had on Title VII or on judicial interpretations of Title VII. As shown below, when Congress enacted the Ledbetter Act, it substantively re-wrote Title VII and changed the actual statutory definition of "occurred" when dealing with pay discrimination.

As is widely known, it is the role of the Supreme Court to say what the law is. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). This function necessarily means that Congress cannot interpret the laws—it can only pass them. *Pierce v. Underwood*, 487 U.S. 552, 566 (1988) (“[I]t is the function of the courts and not the Legislature . . . to say what an enacted statute means.”). It is also widely known that once the Supreme Court interprets a federal statute, its decision is binding on all federal and state courts. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816). Any change to that decision must come from either the Supreme Court or Congress. Consequently, when the Supreme Court interprets a federal statute, its decision is binding and final unless it is overruled by itself. Congress can also “overrule” a Supreme Court decision through subsequent legislation.

However, when Congress passes an amendment in response to a Supreme Court case, it does not “overrule” the Supreme Court's interpretation. See *Gorbach v. Reno*, 219 F.3d 1087, 1097 (9th Cir. 2000) (“[O]bviously Congress cannot ‘overrule’ Supreme Court decisions.”);

Crumley v. Delaware State College, 797 F.Supp. 341, 343 n.2 (D. Del. 1992) (citing *Marbury*, 5 U.S. at 178) (“The word, ‘reversed,’ is in quotations because technically, Congress cannot ‘reverse’ or ‘overrule’ decisions of the Supreme Court.”); *Ribando v. United Airlines, Inc.*, 787 F.Supp. 827, 833 n.8 (N.D. Ill. 1992) (citing *Marbury*, 5 U.S. at 178) (“To say that Congress has the power to overrule decisions of the Supreme Court is simply inaccurate.”). Congress cannot overrule the Supreme Court because the Supreme Court is the only entity that can interpret the laws. *See Ribando*, 787 F.Supp. At 833 n.8 (citing *Marbury v. Madison* for the proposition that “Congress cannot add to nor detract from the powers of the courts granted in the Constitution.”). Accordingly, when the Supreme Court interprets a statute, it has definitively interpreted that statute as it stood at the time. When Congress “overrules” that interpretation, it is actually promulgating new law for the courts to interpret. *See Crumley*, 797 F.Supp. at 343 n.2 (citing *Marbury*, 5 U.S. at 178-180) (“To the extent Congress disagrees with the Supreme Court’s interpretation of a law, Congress may promulgate new law for interpretation by the Court.”). That is, by passing a new amendment, Congress changes the law—it does not just clarify a definition; it alters the statute. The result then is a new statute.

This reasoning played out in the form of the Ledbetter Act. When the Supreme Court decided *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, it was interpreting the term “occurred” in Title VII. 550 U.S. 618 (2007). The Court held that when a plaintiff claims she is paid less based on her gender, the discriminatory act “occurred” when the decision to pay her less was made, not each time she received a pay check. *Id.* at 637. Once the Supreme Court made this

decision, it definitively held that the term “occurred” did not encompass the pay check accrual rule. *See Marbury*, 5 U.S. at 178-180. From that point on, the statute meant that the pay check accrual rule did not exist under the term “occurred.”

When Congress passed the Ledbetter Act, as discussed above, it did not overrule the Supreme Court. Instead, it had to substantively change Title VII and add to the definition of “occurred” in order to reach the result it wanted (i.e., allow each pay check to start the 180 day clock for filing with the EEOC). That is, the Supreme Court’s definition of “occurred” was correct since the Supreme Court alone can say what the law means. In order to “overrule” that decision, Congress had to *add to* the definition of “occurred” or, in other words, it had to promulgate new law for the courts to interpret. *See Crumley*, 797 F.Supp. at 343 n.2 (citing *Marbury*, 5 U.S. at 178-180).

Therefore, with the enactment of the Ledbetter Act, Title VII is now a substantively different statute than it was prior.

II. BECAUSE CHAPTER 21 AND TITLE VII ARE NO LONGER ANALOGOUS WITH REGARD TO DISCRIMINATION IN PAY, THEY SHOULD NOT BE CONSTRUED TOGETHER

Since the passage of Chapter 21, Texas courts have interpreted its provisions by seeking guidance from federal court’s interpretation of similar provisions in Title VII. *See, e.g., Quantum Chemical Corp. v. Toennies*, 47 S.W.3d 473, 476 (Tex. 2001). Additionally, Chapter 21 contains the “general purposes” provision which says that one of Chapter 21’s purposes is to execute the policies of Title VII. TEX. LAB. CODE § 21.001(1). Courts have construed this

provision to allow Title VII policies to influence interpretations of Chapter 21. *See Quantum*, 47 S.W.3d at 476.

However, federal interpretation of Title VII is not absolute and binding on Texas court's interpretation of Chapter 21. There are two restrictions on using Title VII cases for interpreting Chapter 21. First, Texas courts can use Title VII cases as guides only if the two statutes contain analogous provisions. *Id.* (“Therefore, *analogous* federal statutes and the cases interpreting them guide our reading of the TCHRA.”) (emphasis added). Second, to the extent the statutes differ, Texas courts must apply Chapter 21 as written and not substitute Title VII in its place. *See id.* at 479-480 (applying a “motivating factor” burden of proof to Chapter 21 since it's language differs from Title VII).

In this case, because Title VII is no longer similar to Chapter 21, this Court should not interpret Chapter 21's use of the term “occurred” based on the Ledbetter Act's definition nor should the Court incorporate that federal act into Chapter 21. Second, because this Court has interpreted the term “occurred” in Chapter 21 in *Cooper-Day*, it should not look to a non-analogous federal act to overrule its prior decision.

A. Texas Courts Should Not Interpret Chapter 21 Based on the Ledbetter Act Because the Statutes Are No Longer Similar

As discussed above, after the Ledbetter Act was passed, Title VII contained a new provision governing pay discrimination claims. After the Supreme Court decided *Ledbetter*, the statutory phrase “occurred” did not include the pay check accrual rule. Congress then passed the Act and the new provision expanded the definition of “occurred.” Since Title VII

is no longer analogous to Chapter 21 because of that new definition, this Court should not interpret Chapter 21 in light of the Act or adopt the amendment wholesale into Chapter 21.

When interpreting Chapter 21, Texas courts are permitted to look to “cases interpreting the *analogous* federal provisions.” *Niu v. Revcor Molded Prods. Co.*, 206 S.W.3d 723, 728 (Tex. App.—Fort Worth 2006, no pet.) (citing *Caballero v. Cent. Power & Light Co.*, 858 S.W.2d 359, 361 (Tex. 1993)) (emphasis added). In this case, both Title VII and Chapter 21 use the term “occurred” to determine when a plaintiff must file a charge of discrimination. *See* 42 U.S.C. § 2000e-5(e)(1) (“A charge . . . shall be filed within [180] days after the alleged unlawful employment practice *occurred*”) (emphasis added); TEX. LAB. CODE § 21.202(a) (“A complaint . . . must be filed not later than the 180th day after the date the alleged unlawful employment practice *occurred*.”) (emphasis added). As a result, in most circumstances, Texas courts can rely on federal cases interpreting this provision of Title VII because they are analogous.

However, after the Ledbetter Act, these provisions are no longer analogous. Now, Title VII includes a provision specifically defining when a discriminatory act occurs with respect to discrimination in compensation. *See* 42 U.S.C. § 2000e-5(e)(3)(A). That provision substantively changed the definition of “occurred” by expanding it to include each subsequent paycheck. Chapter 21 contains no such addition and retains the same definition of “occurred” as it has always had. Consequently, because they are no longer analogous, Texas courts should not interpret Chapter 21 based on interpretations of Title VII when dealing with discrimination

in compensation.

B. Chapter 21 and Title VII Were Not Meant to be Identical

Indeed, Title VII and Chapter 21 contain many provisions that are not analogous and as a result Texas courts interpret Chapter 21 without seeking guidance from federal courts' interpretation of Title VII. The most striking example is the burdens of proof. Chapter 21 requires a "motivating factor" burden of proof to show discrimination whereas Title VII requires a "but for" standard. *See Arismendez v. Nightingale Home Health Care, Inc.*, 493 F.3d 602, 606-607 (5th Cir. 2007). Due to the differing language in each statute, Texas courts decided that they would interpret Chapter 21 independent of any interpretations of Title VII. The same applies to the filing requirements for both statutes, since Chapter 21 requires filing suit two years after a plaintiff files a charge of discrimination whereas Title VII has no such provision. TEX. LAB. CODE § 21.256. Chapter 21 also requires filing a charge within 180 days of the discriminatory act whereas Title VII has a 300 day deadline for states with a work-sharing agreement. *Compare* TEX. LAB. CODE § 21.202(a) *with* 42 U.S.C. § 2000e-5(e)(1). Chapter 21 requires a plaintiff to file suit within 60 days of receiving his right to sue letter whereas Title VII extends the deadline to 90 days. *Compare* TEX. LAB. CODE § 21.254 *with* 42 U.S.C. § 2000e-5(f)(1). Chapter 21 has a provision requiring that interim workers' compensation and unemployment payments offset any recovery for back pay whereas Title VII has no such provision. TEX. LAB. CODE § 21.258(c). Chapter 21 has a provision explicitly stating that evidence of the employment of one person in place of another is insufficient to establish an

unlawful employment practice whereas Title VII has no similar provision. TEX. LAB. CODE § 21.061.

Another major difference is that Chapter 21 uses a pretext-plus standard in analyzing discrimination claims whereas Title VII does not. *Compare Pineda v. United States Parcel Serv.*, 360 F.3d 483, 489-490 (5th Cir. 2004) (citing *Wal-Mart Stores, Inc. v. Canchola*, 121 S.W.3d 735 (Tex. 2003)) (stating that under Chapter 21, an employee must show that the employer's stated reason for the adverse employment action was a pretext *and* must show that the real reason for the action was discrimination) *with Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 223 (5th Cir. 2000) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000)) (stating that "pretext-plus" does not apply to Title VII cases). Indeed, the Fifth Circuit in *Pineda* expressly stated that it was interpreting Chapter 21, and as a result, federal law was immaterial. *See Pineda*, 360 F.3d at 490 n.8 (stating that the Texas Supreme Court's decision in *Canchola* interpreted Chapter 21 only and that the Fifth Circuit's "ruling in this case should not be interpreted as an adoption of *Canchola* for purposes of federal civil rights law.").

As a result, Texas courts do not look to federal interpretations of Title VII for guidance when applying any of these provisions. *See Lueck v. Texas*, --- S.W.3d ----, 2009 WL 3806163, at *8 (Tex. App.—Austin 2009, no pet.) (citing *Ashcroft v. HEPC-Anatole, Inc.*, 244 S.W.3d 649, 651 (Tex. App.—Dallas 2008, no pet.)) (stating that federal law does not "control" interpretation of Chapter 21 because "Lueck, having elected to bring suit under [Chapter 21], is bound by the procedures that the Texas Legislature created to govern state claims and cannot

import procedural rules from the federal statute.”).

The same analysis applies here. With the Ledbetter Act, Congress fundamentally changed the definition of “occurred” and expanded that definition to include what the Supreme Court said it did not include: a pay check accrual rule. Chapter 21 underwent no such change. Consequently, Texas courts should not look to federal interpretations of “occurred” in Title VII since it is no longer analogous to the term “occurred” under Chapter 21.

By extension then, if Texas courts should not look for guidance from federal courts’ interpretation of Title VII, they should also not adopt a federal amendment into Chapter 21. Such an adoption would—like the Ledbetter Act—substantively alter and expand the definition of “occurred” under Chapter 21. While the Texas Legislature can certainly make that decision if it chooses, it has not done so and it is not for a court to perform that legislative task. Every federal amendment is not automatically incorporated into Chapter 21. That conclusion should be evident since Texas courts look to federal interpretations of Title VII only as a *guide*—not as binding precedent.

Furthermore, since the two statutes are now different and non-analogous, the general purpose provision no longer applies and no longer requires Texas courts to resort to federal interpretation of Title VII. The general purpose provision applies only when the two statutes share a common analogue. *See Davis v. City of Grapevine*, 188 S.W.3d 748, 756-757 (Tex. App.—Fort Worth 2006, pet. denied). As discussed, the Ledbetter Act implemented an entirely new definition to the term “occurred” that is simply non-existent in Chapter 21. For that reason,

the general purpose statute does not require any particular result.

Because Title VII and Chapter 21 are now different in that the Ledbetter Act expanded the definition of “occurred” whereas Chapter 21 did not, this Court should look to and apply only state law interpreting Chapter 21.

C. The Holding in *Cooper-Day* Remains Binding Absent a Statutory Change to Chapter 21

As both Appellant and Appellee mention in their briefs, this Court has already addressed and decided the issue of whether discrimination in pay occurs with each subsequently issued paycheck. *See Cooper-Day v. RME Petroleum, Inc.*, 121 S.W.3d 78 (Tex. App.—Fort Worth 2003, pet. denied). That decision remains the law and nothing has occurred to alter its result. Appellee argues that this Court should overturn that decision based on the Ledbetter Act. However, in asking the Court to do so, Appellee is requiring this Court, not to interpret Chapter 21, but to draft new legislation into Chapter 21.

This Court decided *Cooper-Day* by interpreting Chapter 21 as it existed at that time. It based its decision on the statute’s language, including the term “occurred.” *Id.* at 83. While the Court looked to federal law for guidance, its decision ultimately interpreted Chapter 21's language of “occurred.” *See id.* at 87-88.

From the time this Court decided *Cooper-Day* to today, that language has not changed. The Texas legislature has not amended the language or added to it. This Court has not interpreted the language any differently than when it decided the case. And, this Court has not overturned its previous decision. The language the Court interpreted in *Cooper-Day* is *exactly*

the same today as it was then. Nothing has changed.¹

However, Appellee would nevertheless have this Court reach a different result and overturn its decision based on an amendment passed by the federal government (not the Texas Legislature) amending a federal statute (not Chapter 21). Stated differently, Appellee asks this Court to re-interpret the unchanged language in Chapter 21 based on the amended language of Title VII.

The Court should not do so for a number of reasons. First, it is simply faulty logic for Appellee to argue that this Court should overturn its decision in *Cooper-Day* when the language this Court interpreted in that case remains exactly the same today as it did then. Second, because the statutory language in Chapter 21 remains intact since this Court decided *Cooper-Day*, to adopt a different definition of “occurred” that mirrors Title VII would have the effect of allowing the federal government to amend and expand the definition of “occurred” in Chapter 21. That is, much like the Supreme Court did in *Ledbetter*, this Court’s ruling in *Cooper-Day* interpreted “occurred” and said what it meant. See *Southwestern Bell Telephone Co., L.P. v. Mitchell*, 276 S.W.3d 443, 449 (Tex. 2008) (Jefferson, C.J. dissenting) (“The . . . Court declared the statute’s meaning even if a subsequent Legislature determined that it

¹ Indeed, since no changes to Chapter 21 have occurred, this Court is bound by its prior decision. See, e.g., *Signature Management Team, LLC v. Quixtar, Inc.*, 281 S.W.3d 666, 671 n.1 (Tex. App.–Dallas 2009) (“But in the absence of a decision by a majority of the Texas Supreme Court or by this Court sitting en banc repudiating our prior holding . . . we are bound to follow [our prior holding].”); *Barker CATV Const., Inc. v. Ampro, Inc.*, 989 S.W.2d 789, 793 n.2 (Tex. App.–Houston [1st Dist.] 1999, no pet.) (“[O]ne panel of the Court cannot overrule the decision of a different panel . . .”).

misconstrued legislative intent. A Court’s decision on statutory construction is not infallible, but it must be final so that Texas citizens know how to conduct their affairs”). Allowing an amendment to the federal statute to change that interpretation would result in a change of what the law in Chapter 21 says—as determined by this Court—even though Chapter 21 is identical to when *Cooper-Day* was decided. Third, because this Court has already decided that the term “occurred” in Chapter 21 does not encompass the pay check accrual rule, there is no need for this Court to look to Title VII for guidance. *See Price v. Philadelphia Am. Life Ins.*, 934 S.W.2d 771, 773-774 (Tex. App.—Houston [14th Dist.] 1996, no writ) (quoting *Benavides v. Moore*, 848 S.W.2d 190, 193 (Tex. App.—Corpus Christi 1992, writ denied)) (“When Texas case law *fails to address* questions raised under the statute, we look to federal case law for guidance.”) (emphasis added).

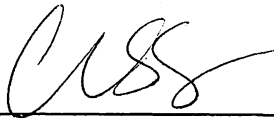
Therefore, this Court should not overturn its decision in *Cooper-Day* based on the Ledbetter Act’s change to Title VII.

PRAYER

For the reasons stated above, TAB asks the Court to reverse the District Court’s decision and hold that the Ledbetter Act is not adopted into Chapter 21.

Respectfully submitted,

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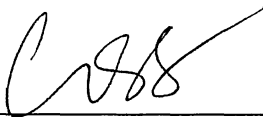
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Amicus Texas Association of Business was sent via certified mail, return receipt requested to the following on this 1 day of June, 2010.

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