

NO. 02-10-00052-CV

**In the Second District Court of Appeals
At Fort Worth**

TARRANT REGIONAL WATER DISTRICT,

Appellant,

v.

TAMARA VILLANUEVA,

Appellee.

**Appealed from the 342nd District Court
of Tarrant County, Texas
Honorable Bob McGrath Presiding**

APPELLANT'S BRIEF

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TABLE OF CONTENTS

IDENTITY OF PARTIES AND COUNSEL i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

I. Statement of the Case 1

II. Statement of Jurisdiction 2

III. Issue Presented 2

IV. Statement of Facts 3

V. Summary of the Argument 7

VI. Argument and Authorities 9

 A. Pleas to the Jurisdiction and the Standard of Review. 9

 1. The proper method for a governmental entity to challenge the trial court’s jurisdiction over a TCHRA claim is by filing a Plea to the Jurisdiction. 9

 2. The standard of review..... 10

 B. Under existing Texas law, pay discrimination complaints must be administratively exhausted by filing a charge with the Texas Workforce Commission within 180 days from the date the pay-setting decision occurred..... 13

 1. TCHRA’s administrative exhaustion requirement..... 13

 2. Administrative exhaustion of pay discrimination complaints and this Court’s holding in *Cooper-Day*. 14

 C. The *Ledbetter* decision and the resulting Ledbetter Act. 17

 1. The *Ledbetter* decision..... 17

 2. The Ledbetter Act. 19

D.	Unsuccessful effort in the Texas Legislature to amend the Texas Commission on Human Rights Act to mirror the Ledbetter Fair Pay Act.	21
E.	Absent an express amendment to the TCHRA, the rule in <i>Cooper-Day</i> remains Texas law and requires dismissal of Villanueva’s pay discrimination complaint.	22
1.	Absent an amendment, the Ledbetter Act does not apply to Texas state discrimination law and the rule in <i>Cooper-Day</i> is still the law in Texas.....	22
2.	The rule in <i>Cooper-Day</i> requires dismissal of Villanueva’s gender discrimination claim.	33
VII.	Prayer.....	39
	APPENDIX	40

TABLE OF AUTHORITIES

STATE CASES

<i>Anderson v. Limestone County</i> , 2008 Tex. App. LEXIS 5041 (Tex. App. – Waco 2008, pet. denied).....	14, 37
<i>Anheuser-Busch Cos. v. Summit Coffee Co.</i> , 934 S.W.3d 705 (Tex. App. – Dallas 1996, writ dism'd)	26
<i>Bland Indep. Sch. Dist. v. Blue</i> , 34 S.W.3d 547 (Tex. 2000)	10
<i>Cooper-Day v. RME Petroleum Co.</i> , 121 S.W.3d 78 (Tex. App. – Fort Worth 2003, pet. denied).....	2, 8-9, 13-19, 22, 29-31, 33, 37-38
<i>Cox & Smith, Inc. v. Cook</i> , 974 S.W.2d 217 (Tex. App. – San Antonio 1998, pet. denied)	29
<i>Eubanks v. Mullin</i> , 909 S.W.2d 574 (Tex. App. – Fort Worth 1995, orig. proceeding)	27
<i>Harris County Hosp. Dist. v. Tomball Reg. Hosp.</i> , 283 S.W.3d 838 (Tex. 2009)	26
<i>Little v. Texas Dep't of Criminal Justice</i> , 148 S.W.3d 374 (Tex. 2004)	1, 24-25
<i>Mission Consolidated Indep. Sch. Dist. v. Garcia</i> , 253 S.W.3d 653 (Tex. 2008)	10
<i>Prairie View A & M Univ. v. Chatha</i> , 2010 Tex. App. LEXIS 2318 (Tex. App. – Houston [1 st Dist.] 2010, no pet. h.).....	27-30, 32-33
<i>Quantum Chemical Corp. v. Toennies</i> , 47 S.W.3d 473 (Tex. 2001)	23, 26, 31
<i>Simmons v. Arnim</i> , 220 S.W. 66 (Tex. 1920)	26

<i>Specialty Retailers, Inc. v. DeMoranville</i> , 933 S.W.2d 490 (Tex. 1996)	10
<i>Speer v. Presbyterian Children’s Home and Serv. Agency</i> , 847 S.W.2d 227 (Tex. 1993)	23, 26
<i>Tarrant Regional Water District v. Gragg</i> , 151 S.W.3d 546 (Tex. 2004)	2
<i>Texas Dep’t of Parks & Wildlife v. Miranda</i> , 133 S.W.3d 217 (Tex. 2004)	10-12
<i>Univ. of Texas v. Poindexter</i> , 2009 Tex. App. LEXIS 5112 (Tex. App. – Austin 2009, no pet.)	11

FEDERAL CASES

<i>Arismendez v. Nightingale Home Health Care, Inc.</i> , 493 F.3d 602 (5 th Cir. 2007)	23
<i>Berry v. Bd. of Supervisors</i> , 715 F.2d 971 (5 th Cir. 1983)	16
<i>Klebe v. Univ. of Texas Sys.</i> , 649 F. Supp.2d 568 (W.D. Tex. 2009)	30, 32
<i>Ledbetter v. The Goodyear Tire & Rubber Co., Inc.</i> , 550 U.S. 618 (2007)	8, 17-22, 29
<i>Lohn v. Morgan Stanley DW, Inc.</i> , 652 F. Supp.2d 812 (S.D. Tex. 2009)	30, 32

TEXAS STATUTES

TEX. CIV. PRAC. & REM. CODE § 101.001	2
TEX. CIV. PRAC. & REM. CODE § 51.014(8)	2
TEX. GOV’T CODE § 311.034	10

TEX. LAB. CODE § 21.001(1).....	23, 27-28, 31-32
TEX. LAB. CODE § 21.0015.....	1
TEX. LAB. CODE § 21.051.....	1
TEX. LAB. CODE § 21.055.....	1
TEX. LAB. CODE § 21.201(a).....	13, 14, 17
TEX. LAB. CODE § 21.202.....	13
TEX. LAB. CODE § 21.202(a).....	10, 13, 21-22, 30-31, 38
TEX. LAB. CODE § 21.254.....	23
TEX. LAB. CODE § 21.256.....	23

FEDERAL STATUTES

42 U.S.C.A. § 2000e-5(e)(3)(A) (2009).....	21
42 U.S.C.A. § 2000e-5(f)(1).....	23

I.

STATEMENT OF THE CASE

- Nature of the case:* Gender discrimination and retaliation lawsuit brought against Tarrant Regional Water District (“TRWD”) by Tamara Villanueva (“Villanueva”), a former employee, pursuant to § 21.051 and § 21.055 of the Texas Labor Code.¹
- Trial court:* The Honorable Bob McGrath, Judge Presiding, 342nd District Court, Tarrant County, Texas.
- Trial court’s disposition:* TRWD filed a Partial Plea to the Jurisdiction challenging the trial court’s jurisdiction over Villanueva’s gender discrimination claim.² The trial court denied the Plea.³

¹ Chapter 21 of the Labor Code was entitled the Texas Commission on Human Rights Act (“TCHRA”) until the Legislature’s abolition of the Commission on Human Rights in 2004. *See Little v. Texas Dep’t of Criminal Justice*, 148 S.W.3d 374, 377-78 (Tex. 2004). In 2004, the powers and duties of the Commission on Human Rights were transferred to the Texas Workforce Commission – Civil Rights Division. *See* TEX. LAB. CODE § 21.0015. As is historically the custom, however, Appellant will refer to Chapter 21 as the “TCHRA” throughout this brief.

² Clerk’s Record (“CR”) at 11-57.

³ Order, Appendix A.

II.

STATEMENT OF JURISDICTION

Under § 51.014(8) of the Texas Civil Practice & Remedies Code, “a person may appeal from an interlocutory order of a district court” that “grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001.” It is undisputed that TRWD, as a water control and improvement district, is a governmental unit within the definition of § 101.001 of the Texas Civil Practice & Remedies Code.⁴ Consequently, this Court has jurisdiction over this interlocutory appeal.

III.

ISSUES PRESENTED

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)?

⁴ See TEX. CIV. PRAC. & REM. CODE § 101.001(3)(B); see also *Tarrant Regional Water District v. Gragg*, 151 S.W.3d 546, 549 (Tex. 2004) (TRWD “is a water control and improvement district created under article XVI, section 59, of the Texas Constitution” and a “political subdivision of the State.”).

IV.

STATEMENT OF FACTS

Villanueva was employed by TRWD in the position of a Senior Buyer in its Purchasing Department until July 2006, when – for the second time – she tested positive for marijuana use and was terminated.⁵ She was replaced by David Owen (“Owen”), a male employee who transferred from another department.⁶ In October 2006, despite her prior drug use, TRWD rehired Villanueva and placed her back in the Purchasing Department in the position of Contract Administrator.⁷ As the new position had different responsibilities⁸ than those she previously held in the Senior Buyer position and required her to report to Owen, Villanueva was paid less than she previously earned in her old position and, thus, less than Owen.⁹ By her calculation, she was making at least \$6,000 a year less than Owen as of November 2007.¹⁰

Villanueva’s annual performance review was held in the fall of 2007 and, as a result of the review, she was given a four percent raise in October of that year.¹¹ Villanueva, however, felt she should have been give at least a five percent raise and

⁵ CR at 12.

⁶ *Id.*

⁷ *Id.*

⁸ Villanueva disputes that her responsibilities were significantly different than Owens’s and this dispute forms the heart of the merits of her gender discrimination claim. The merits of her claim, however, are not at issue in this appeal.

⁹ *Id.*

¹⁰ CR at 26.

¹¹ CR at 13.

requested the higher amount.¹² Her request for the larger amount was denied.¹³ Within a month of TRWD's decision not give Villanueva the additional amount she requested, Villanueva hired attorney Rod Tanner ("Tanner") to represent her for the purpose of presenting a claim of pay discrimination to TRWD.¹⁴

Consequently, on November 8, 2007, Tanner sent a letter to TRWD's General Manager accusing TRWD of pay discrimination under the federal Equal Pay Act ("EPA"), Title VII of the Civil Rights Act of 1964 ("Title VII"), and the TCHRA.¹⁵ In his three-page letter, Tanner outlined the factual basis of Villanueva's discrimination claim asserting specifically that Villanueva should have been making at least as much as Owen and that TRWD's decision to deny her request for a five percent raise constituted gender discrimination under the TCHRA, as well as Title VII and the EPA.¹⁶

The parties mediated the dispute in January 2008 but were unable to resolve their differences.¹⁷ Villanueva, however, remained a TRWD employee until May 28, 2008, when she informed TRWD that she was physically incapable of performing her position after being diagnosed with bilateral degenerative joint disease in her knees and she was thereafter terminated.¹⁸

¹² CR at 30-31A.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ CR at 26-28.

¹⁶ *Id.*

¹⁷ CR at 14.

¹⁸ *Id.*

On August 15, 2008 (nine month's after her attorney's demand letter), Villanueva filed a Charge of Discrimination ("the Charge") with the U.S. Equal Employment Opportunity Commission ("EEOC") and the Civil Rights Division of the Texas Workforce Commission.¹⁹ The Charge alleged gender discrimination in relation to her pay and retaliation as a result of her discharge.²⁰ Before the state and federal agencies concluded their investigations, Villanueva requested a Right to Sue letter and, on May 7, 2009, filed the present lawsuit.²¹ Like the Charge, the Original Petition contained two claims asserted *solely* under the TCHRA:²² first, that TRWD discriminated against Villanueva by paying her less than Owen allegedly due to her gender and, second, that TRWD purportedly retaliated against her for making her November 2007 pay complaint when it reassigned her to a new position and ultimately terminated her employment in May 2008.²³

On December 4, 2009, TRWD filed a Partial Plea to the Jurisdiction seeking dismissal of the gender discrimination complaint (which was based solely on Villanueva's rate of pay) on the ground that Villanueva failed to file her charge with the Texas Workforce Commission within 180 days of her undisputed knowledge of TRWD's allegedly discriminatory actions and, thus, did not properly exhaust her administrative

¹⁹ CR at 33.

²⁰ *Id.*

²¹ Original Petition, CR 2-10.

²² The federal EPA and Title VII claims were abandoned; presumably to take advantage of the state forum which is often perceived by the plaintiff's bar as less inhospitable to employment claims than the federal courts.

²³ *Id.*

remedies thereby depriving the trial court of jurisdiction over this claim.²⁴ TRWD contended that Villanueva's charge was filed more than nine months after her request for a raise was denied and Tanner's November 2007 letter made resolutely clear that she had full knowledge of the basis and nature of her claims as of that date.

On January 7, 2010, Villanueva filed a Response to the Plea.²⁵ In her Response, Villanueva did not dispute the evidence submitted by TRWD nor did she dispute that Texas law would ordinarily require dismissal of the claim. Instead, Villanueva relied exclusively on a recent amendment to Title VII – the Lily Ledbetter Fair Pay Act of 2009 (“Ledbetter Act”) – contending that, as a matter of her law, her administrative charge was timely filed because it was filed within 180 days of *at least one* of her paychecks and, as the Ledbetter Act amended Title VII to codify this “paycheck accrual” rule, her claim under the TCHRA was timely exhausted.

On January 8, 2010, the trial court held a hearing on the Plea. The Court did not make a ruling at the hearing²⁶ but on February 9, 2010 entered an Order denying the Plea.²⁷ On February 16, 2010, TRWD timely filed its Notice of Appeal.²⁸

²⁴ Defendant Tarrant Regional Water District's Plea to the Jurisdiction, CR at 11-57. TRWD did not challenge the retaliation claim on jurisdictional grounds.

²⁵ CR at 60-71A.

²⁶ The hearing was not held with the benefit of a court reporter's record. At the hearing, however, the trial court indicated general agreement with TRWD's position but gave Villanueva's counsel the option of amending her petition to remove the claim or denying the plea and forcing Villanueva to contend with TRWD's inevitable appeal. Villanueva ultimately chose the latter course.

²⁷ Order, Appendix A.

²⁸ CR at 73.

V.

SUMMARY OF THE ARGUMENT

This appeal involves a discrete legal question requiring the Court to closely examine the interrelationship between Texas and federal laws outlawing employment discrimination. The specific issue presented here is whether, as a matter of law, the federal Ledbetter Act applies to Texas state law pay discrimination claims absent a correlative amendment to the TCHRA by the Texas Legislature. The answer to this question, however, has ramifications for *every* TCHRA case – either currently pending or which may be filed in the future – directly involving *any* provision of the TCHRA that, in its wording, is markedly different from Title VII or other related federal employment laws.

In this particular case, the evidence below was undisputed that Villanueva failed to file her charge of gender discrimination complaining about her pay within 180 days of her knowledge of the alleged discriminatory acts purportedly committed by TRWD. In response to TRWD’s assertion that she failed to timely exhaust her administrative remedies under the TCHRA, Villanueva urged the trial court to adopt the “paycheck accrual” rule. Under this theory, any paycheck issued to an employee pursuant to an allegedly discriminatory pay rate decision starts the time period for filing a charge of discrimination anew – no matter how long ago the allegedly discriminatory pay rate decision occurred and regardless of when the employee learned of the employer’s actions. Thus, because she received at least one paycheck within the statutory time

frame, Villanueva argued that she had timely exhausted her administrative remedies. In *Cooper-Day v. RME Petroleum Co.*, 121 S.W.3d 78 (Tex. App. – Fort Worth 2003, pet. denied), however, this Court unequivocally rejected Villanueva’s proposed paycheck accrual rule. As this Court explained, under the TCHRA, “the fact that the employee might have felt the effects of the discriminatory treatment later or that the damage may continue to occur for an extended period of time after the discriminatory treatment does not extend the commencement of limitations.”²⁹

At the same time *Cooper-Day* was decided, the battle over the viability of the paycheck accrual rule was also being played out in the federal courts under Title VII. Finally, in *Ledbetter v. The Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007), the U.S. Supreme Court directly addressed the issue (four years after the issuance of *Cooper-Day*) and, like this Court in *Cooper-Day*, rejected the paycheck accrual rule in the context of Title VII. The *Ledbetter* decision, however, almost immediately faced hostility from a Democratically-controlled Congress and became a campaign issue during the 2008 presidential campaign. After the election of President Barack Obama, Congress jammed an amendment adopting the paycheck accrual rule through to successful (but contentious and highly divisive) legislative passage and President Obama signed the amendment into law as his first act as President.

Villanueva contends that, as a result of federal passage of the Ledbetter Act, the TCHRA should be read to automatically incorporate the Ledbetter Act into its terms therefore making her gender discrimination claim timely. Her argument, however,

²⁹ 121 S.W.3d at 83.

necessarily relies on a contorted view of the “general purposes” provision of the TCHRA and, correspondingly, the bald assumption that *any* amendment to Title VII must, *ipso facto*, be incorporated into the TCHRA even though the Texas Legislature has not amended the TCHRA to explicitly adopt the federal amendment. The TCHRA’s “general purposes” provision, however, cannot – and must not – be read as an “automatic incorporation” provision. Only if the Texas Legislature expressly amends the TCHRA to incorporate an amendment to Title VII – a power it has exercised on numerous occasions – should the federal amendment become part of Texas law. Otherwise, the authority of the Texas Legislature would be entirely usurped by Congressional whims and Texas employment law will become nothing more than an extension of federal power. Accordingly, this Court should refuse to judicially-incorporate the Ledbetter Act into the TCHRA and the trial court’s order denying Tarrant Regional Water District’s Plea to the Jurisdiction must be reversed under the rule stated in *Cooper-Day*.

VI.

ARGUMENT AND AUTHORITIES

A. Pleas to the Jurisdiction and the Standard of Review.

1. The proper method for a governmental entity to challenge the trial court’s jurisdiction over a TCHRA claim is by filing a Plea to the Jurisdiction.

In this case, TRWD challenges Villanueva’s pay discrimination claim on the basis of her failure to file an administrative charge of discrimination with the Texas Workforce

Commission within 180 days of the alleged discriminatory act taken by TRWD.³⁰ Filing a timely charge with the Commission is a prerequisite to bringing a subsequent lawsuit for discrimination.³¹ Moreover, in *Mission Consolidated Indep. Sch. Dist. v. Garcia*, the Texas Supreme Court held that, though the TCHRA waives a governmental entity's immunity from suit, that waiver is only applicable when the plaintiff-employee has met the administrative procedures outlined in the statute prior to bringing suit under the Act.³² Indeed, under § 311.034 of the Government Code, any "[s]tatutory prerequisites to a suit, including the provision of notice, are *jurisdictional* requirements in *all* suits against a governmental entity."³³ Thus, if a litigant against the government fails to meet all the statutory prerequisites to filing her claim, the trial court lacks jurisdiction over it. And the government's proper procedural vehicle for challenging the trial court's jurisdiction is a plea to the jurisdiction.³⁴

2. The standard of review.

Whether a court has subject matter jurisdiction is a question of law.³⁵ Such a determination is, on appeal, reviewed de novo.³⁶ A plea to the jurisdiction often may be determined solely from the pleadings.³⁷ When a plea to the jurisdiction challenges the

³⁰ See TEX. LABOR CODE § 21.202(a) ("A complaint under this subchapter must be filed not later than the 180th day after the date the alleged unlawful employment practice occurred.")

³¹ *Specialty Retailers, Inc. v. DeMoranville*, 933 S.W.2d 490, 492 (Tex. 1996).

³² 253 S.W.3d 653, 660 (Tex. 2008).

³³ TEX. GOV'T CODE § 311.034 (last sentence) (emphasis added).

³⁴ *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554-55 (Tex. 2000).

existence of jurisdictional facts, however, a court must consider all of the relevant evidence submitted by the parties to the extent the evidence is necessary to resolving the jurisdictional issue being raised.³⁸

Cases involving the analysis of jurisdictional facts fall into one of two different categories: (1) those in which the jurisdictional issue or facts do not substantially implicate the merits of the plaintiff's case, but rather are, for the most part, separate and distinct from the merits; and (2) those cases in which the jurisdictional issue or facts implicate the merits of the plaintiff's case.³⁹

Where the jurisdictional facts do not implicate the merits of the case, and the facts are disputed, the court – not the jury – must make the necessary fact findings to resolve the jurisdictional issue.⁴⁰ On the other hand, if the jurisdictional facts are undisputed, the court must make the jurisdictional determination as a matter of law based solely on the undisputed facts.⁴¹ On appeal, any fact findings made to resolve the jurisdictional issue may be challenged, as any other fact findings, for legal and factual sufficiency (including any implied findings if written findings and conclusions are not issued by the trial court).⁴²

³⁸ *Id.*

³⁹ *Univ. of Texas v. Poindexter*, 2009 Tex. App. LEXIS 5112, *9 (Tex. App. – Austin 2009, no pet.).

⁴⁰ *Id.* (citing *Miranda*, 133 S.W.3d at 226.) (“Whether a district court has subject matter jurisdiction is a question for the court, not a jury, to decide, even if the determination requires making factual findings, unless the jurisdictional issue is inextricably bound to the merits of the case.”).

⁴¹ *Miranda*, 133 S.W.3d at 228.

⁴² *Poindexter*, 2009 Tex. App. LEXIS 5112 at *10.

In the second category of cases, where the jurisdictional facts do implicate the merits, because the trial court cannot delve deeply into the merits of the plaintiff's claim at the jurisdictional stage, the trial court does not act as a fact finder.⁴³ Instead, the defendant's burden is similar to the burden imposed on a movant for summary judgment: if the evidence raises a fact issue, the trial court cannot grant the plea but must submit the issue to the jury. Conversely, if the evidence does not raise a fact issue, the trial court must rule on the plea as a matter of law.⁴⁴ On appeal, the appellate court must resolve the issue de novo, and as when evaluating an order granting summary judgment, should indulge every reasonable inference and resolve any doubts in the nonmovant's favor.⁴⁵

The present appeal falls into the first category of cases: those *not* implicating the merits of the plaintiff's claim. The issue in the trial court was whether Villanueva filed her administrative charge of gender discrimination within 180 days of the purported discriminatory employment action taken by TRWD. The merits of her underlying gender claim were not at issue in the proceeding below. Moreover, the facts relevant to the issue of whether Villanueva timely filed her claim are undisputed. Villanueva did not challenge TRWD's evidence in the trial court; instead, her *sole* argument was that the newly-enacted federal Ledbetter Act saved her claims from dismissal. Thus, the trial court was required to make its determination as a matter of law "based solely on those

⁴³ *Id.*

⁴⁴ *Miranda*, 133 S.W.3d at 227-28.

⁴⁵ *Id.* at 228.

undisputed facts and, on appeal, this Court's review [of the trial court's ruling] is de novo."⁴⁶

B. Under existing Texas law, pay discrimination complaints must be administratively exhausted by filing a charge with the Texas Workforce Commission within 180 days from the date the pay-setting decision "occurred."

1. TCHRA's administrative exhaustion requirement.

Prior to filing suit for employment discrimination under the TCHRA, a discrimination plaintiff must file a sworn, written complaint of discrimination with the Texas Workforce Commission.⁴⁷ Under § 21.202 of the Labor Code, that complaint *must* be filed no later than 180 days after the occurrence of the alleged discriminatory act. Specifically, the statute provides:

A complaint under this subchapter must be filed not later than the 180th day after the date the alleged unlawful employment practice *occurred*.⁴⁸

The 180-day period begins to run "when the employee is informed of the allegedly discriminatory employment decision, not when that decision comes to fruition."⁴⁹ When acts supportive of a civil rights action are, or should be, apparent to a reasonable person,

⁴⁶ *Id.*

⁴⁷ TEX. LAB. CODE § 21.201(a).

⁴⁸ TEX. LAB. CODE § 21.202(a) (emphasis added).

⁴⁹ *Cooper-Day v. RME Petroleum Co.*, 121 S.W.3d 78, 83 (Tex. App.-Fort Worth 2003, pet. denied.).

the period for filing a charge begins.⁵⁰ The “focus is on what event should, in fairness and logic, have alerted the average layperson to act to protect his or her rights.”⁵¹

2. Administrative exhaustion of pay discrimination complaints and this Court’s holding in *Cooper-Day*.

In *Cooper-Day v. RME Petroleum, Inc.*, a 2003 opinion authored by Justice Sue Walker, this Court evaluated when and how a claim for pay discrimination must be exhausted in light of the 180-day requirement contained in § 21.201(a) of the Labor Code. In doing so, this Court rejected the “paycheck accrual” rule urged by the plaintiff in *Cooper-Day* (and by Villanueva here).

Cooper-Day, a former employee of Union Pacific Resources (“UPR”), complained about several pay decisions made by UPR, contending that each was discriminatory on the basis of gender.⁵² UPR moved for dismissal in the trial court, contending that Cooper-Day failed to file her administrative charge challenging the pay decisions until well beyond 180 days from the time she became aware of them.⁵³ The trial court granted summary judgment.⁵⁴ On appeal, Cooper-Day contended that her pay discrimination claim was timely “because she received her last paycheck within 180 days of her claim” and her pay reflected previous pay-setting decisions that were discriminatory.⁵⁵

⁵⁰ *Anderson v. Limestone County*, 2008 Tex. App. LEXIS 5041 (Tex. App. – Waco 2008, pet. denied) (quoting *Wal-mart Stores v. Davis*, 979 S.W.2d 30, 42 (Tex. App.-Austin 1998, pet. denied)).

⁵¹ *Id.*

⁵² 121 S.W.3d at 85.

⁵³ *Id.* at 82.

⁵⁴ *Id.*

⁵⁵ *Id.* at 83.

In analyzing her argument, this Court noted that the 180-day limitations period begins to run “when the employee is informed of the allegedly discriminatory employment decision, not when that decision comes to fruition.”⁵⁶ In other words:

The fact that the employee might have felt the effects of the discriminatory treatment later or that the damage may continue to occur for an extended period of time after the discriminatory treatment does not extend the commencement of limitations. Thus, the 180-day limitations period for an employment discrimination complaint commences on the date the alleged unlawful employment practices *occurred*.⁵⁷

In reference to pay discrimination complaints in particular, Justice Walker explained that the employment practice occurs “when the employee is informed of the allegedly discriminatory pay.”⁵⁸ “Pay discrimination does not continue to occur until the last allegedly discriminatory paycheck is received unless the employer has implemented a facially invalid payment system and continues to pay under that system or the unequal pay is part of, or a repetition of, a past employment violation.”⁵⁹ Consequently, because Cooper-Day had notice of the alleged discriminatory pay decisions more than 180 days before she filed her complaint, “her paychecks were merely the inevitable consequence of UPR’s pay rate decisions” and her pay claims “accrued each time she was informed that she was receiving a raise, albeit a raise she did not consider equal to those given to men.”⁶⁰

⁵⁶ *Id.*

⁵⁷ *Id.* (emphasis in original).

⁵⁸ *Id.*

⁵⁹ *Id.* at 84.

⁶⁰ *Id.* at 85 (citations omitted).

In an effort to extend the limitations period, however, Cooper-Day argued that because she received her final paycheck within 180 days of the date she filed her administrative complaint, the complaint was timely under a “continuing violation” theory.⁶¹ In other words, Cooper-Day relied on a “paycheck accrual” rule, *i.e.*, each time she received a check from UPR that reflected a past discriminatory pay decision her receipt of pay reflected a “continuing violation” and the time period to file a charge, thus, began to run anew with each paycheck. This Court rejected Cooper-Day’s paycheck accrual contention. As the court explained, in determining whether unlawful discrimination is a discrete act or a continuing violation, courts look to several factors:

The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring . . . or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee’s awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?⁶²

In applying this test to Cooper-Day’s claims, the Court found there was no evidence demonstrating an “organized scheme” of pay discrimination.⁶³ More importantly, however, the Court held that “the permanence of [UPR’s] pay rate decisions, made annually except when a promotion was involved, should have triggered Cooper-Day’s awareness of and duty to assert her rights whe[n] she believed UPR’s 1996, 1997,

⁶¹ *Id.* at 87.

⁶² *Id.* at 87 (quoting *Berry v. Bd. of Supervisors*, 715 F.2d 971, 981 (5th Cir. 1983)).

⁶³ *Id.*

and 1998 pay decisions were discriminatory.”⁶⁴ Consequently, this Court rejected Cooper-Day’s paycheck accrual theory, holding Cooper-Day’s receipt of at least one paycheck within the 180-day period to be insufficient to meet the limitations requirement contained in § 21.201(a) of the Labor Code.⁶⁵

As explained below, this holding remains Texas law absent a decision by this Court to overturn its prior decision in *Cooper-Day* in favor of applying the federal Ledbetter Act.

C. The *Ledbetter* decision and the resulting Ledbetter Act.

1. The *Ledbetter* decision.

In 2007, the U.S. Supreme Court granted certiorari in *Ledbetter v. The Goodyear Tire & Rubber Co., Inc.*, 421 F.3d 1169 (11th Cir. 2005), to resolve a split in the U.S. Courts of Appeal as to the proper application of the administrative limitations period in Title VII pay discrimination cases.⁶⁶ At issue in *Ledbetter* was when a pay discrimination claim “occurred” for purposes of the limitations period contained in Title VII. *Ledbetter* argued that, even though she failed to timely file an administrative complaint challenging several of her employer’s pay-setting decisions as discriminatory, her complaint was timely under the “paycheck accrual” theory.⁶⁷ In essence, *Ledbetter*, like *Cooper-Day*, asserted that, as prior decisions to deny her a raise were allegedly unlawful, each time she was issued a paycheck reflecting a rate of pay based on those

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ 550 U.S. 618 (2007).

⁶⁷ *Id.* at 624.

decisions, a separate act of discrimination “occurred” and, thus, the clock to file an administrative claim with the EEOC started anew.⁶⁸

In a 5 to 4 decision authored by Justice Alito (joined by Justices Thomas, Scalia, Kennedy and Chief Justice Roberts), the Supreme Court rejected Ledbetter’s proposed paycheck accrual rule. Specifically, the Court, interpreting its prior precedent, held that, for purposes of timeliness, the relevant focus is on the specific and discrete act of discrimination involved – *not* the purported *effects* of the employer’s action.⁶⁹ In support of its position, the Court noted that sound policy dictated that the “paycheck accrual” rule be rejected. “Not only would Ledbetter’s argument effectively eliminate the defining element of her disparate-treatment claim, but it would distort Title VII’s ‘integrated, multistep enforcement procedure,’”⁷⁰ a procedure which resulted from numerous legislative compromises during the passage of Title VII that saw the strict administrative filing deadline as a statute of limitation serving the valid policy of repose.⁷¹ As the Court stated, the filing deadline protected employers from the burden of defending claims arising from employment decisions long past.⁷² For example, “the critical issue in a case involving a long-past performance evaluation will often be whether the evaluation was so far off the mark that a sufficient inference of discriminatory intent can be drawn.”⁷³ As

⁶⁸ *Id.*

⁶⁹ *Id.* at 625-626.

⁷⁰ *Id.* at 629 (quoting *Occidental Life Ins. Co. of California v. EEOC*, 432 U.S. 355, 359 (1977)).

⁷¹ *Id.*

⁷² *Id.* at 630.

⁷³ *Id.* at 631.

“this can be a subtle determination, [] the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened.”⁷⁴ Consequently, “strict adherence to the procedural requirements specified by the legislature is the best guarantee of even-handed administration of the law.”⁷⁵ Thus, the U.S. Supreme Court, like this Court four years before in *Cooper-Day*, rejected the paycheck accrual rule and held that Ledbetter’s claims were untimely.

2. The Ledbetter Act.

The reaction to *Ledbetter* by Democratic members of Congress was immediate and negative. Less than a month after the opinion was issued, Representative George Miller (D – California) introduced H.R. 2831 (“The Lilly Ledbetter Fair Pay Act of 2007”) in the 110th Congress.⁷⁶ The bill essentially sought to adopt the “paycheck accrual” rule rejected by the Supreme Court in *Ledbetter* (and, four years before, by this Court in *Cooper-Day*). On July 31, 2007, the bill, which engendered sharp Congressional debate, passed the House of Representatives by roll call vote: 225 to 199.⁷⁷ The vote split largely along party lines with almost all Republicans opposing the bill.⁷⁸ The majority (19-12) of the Texas Congressional delegation also opposed the bill.⁷⁹ When it reached the Senate, however, the bill failed a cloture motion which prevented the

⁷⁴ *Id.* at 632.

⁷⁵ *Id.* (quoting *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980)).

⁷⁶ Summary of HR 2831 located at <http://www.govtrack.us/congress/bill.xpd?bill=h110-2831> (visited on April 6, 2010).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

Senate from holding a roll call vote.⁸⁰ Consequently, the bill died without Senate passage at the expiration of the term of the 110th Congress.

In the 2008 federal election campaign that followed, the *Ledbetter* opinion became a political point of contention, with Democrats citing Republican opposition to H.R. 2831 as a campaign issue. Democratic presidential candidate Barack Obama clearly supported the bill.⁸¹ After President Obama's successful election, on January 8, 2009, Senator Barbara Mikulski (D – Maryland) introduced a new version of the bill (S. 181) in the 111th Congress (“The Lily Ledbetter Fair Pay Act of 2009”).⁸² After the 2008 elections, Democrats controlled both houses of Congress with a filibuster-proof supermajority in the U.S. Senate and, consequently, the bill moved rapidly through the legislative process.⁸³ Again, however, the vote was split largely along party lines in both the House and Senate and, once again, the majority of the Texas Congressional delegation opposed the bill.⁸⁴ Nevertheless, on January 22, 2009, the bill passed the Senate (61-36) and, on January 27, 2009, the House also passed (250-177) the bill.⁸⁵ Two days after passage in

⁸⁰ *Id.*

⁸¹ Corey Dade, *Obama's First Shot at Palin Focuses on Equal Pay*, THE WALL STREET JOURNAL (August 31, 2008), <http://blogs.wsj.com/washwire/2008/08/31/obamas-first-shot-at-palin-focuses-on-equal-pay/> (visited April 6, 2010).

⁸² Summary of S. 181 located at <http://www.govtrack.us/congress/bill.xpd?bill=s111-181> (visited April 6, 2010).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

the Senate, as his first legislative act, President Obama signed the Ledbetter Act into law.⁸⁶

At its core, the Ledbetter Act amended Title VII's definition of "occurrence" (by which the administrative timeline to file a charge of pay discrimination begins running) as follows:

For purposes of this section, an unlawful employment practice *occurs*, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or *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*, resulting in whole or in part from such a decision or other practice.⁸⁷

Thus, by passage of the Ledbetter Act, Congress – though sharply divided on the point – rejected the Supreme Court's interpretation, in the *Ledbetter* opinion, of Title VII's use of the term "occurrence" in the context of pay disputes and adopted Ledbetter's proposed "paycheck accrual" rule for purposes of pay discrimination claims.

D. Unsuccessful effort in the Texas Legislature to amend the Texas Commission on Human Rights Act to mirror the Ledbetter Fair Pay Act.

On March 9, 2009, little over a month after President Obama signed the Ledbetter Act into law, Texas State Senator Wendy Davis (D – Fort Worth) introduced Senate Bill 986 in the 81st Regular Session of the Texas Legislature. The bill proposed to amend § 21.202(a) of the Labor Code by incorporating the paycheck accrual rule from the

⁸⁶ *Id.*

⁸⁷ 42 U.S.C.A. § 2000e-5(e)(3)(A) (2009) (emphasis added).

