

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 REPLY BRIEF

Joel E. Geary
Texas Bar No. 24002129
VINCENT LOPEZ SERAFINO JENEVEIN, P.C.
1601 Elm Street, Suite 4100
Dallas, Texas 75201
214/979-7400
214/979-7402 – Facsimile

ATTORNEYS FOR APPELLANT
TARRANT REGIONAL WATER DISTRICT

TABLE OF CONTENTS

TABLE OF CONTENTSii

TABLE OF AUTHORITIES.....iii

I. Reply4

 A. *Cooper-Day* cannot be contorted into supporting Villanueva’s incorporation theory.....4

 B. “Execution” of Title VII’s “policies” does not equal automatic incorporation of Title VII amendments.....5

II. Prayer.....7

TABLE OF AUTHORITIES

STATE CASES

Cooper-Day v. RME Petroleum Co., 1, 2, 4
121 S.W.3d 78 (Tex. App. – Fort Worth 2003, pet. denied)

NME Hosps., Inc. v. Rennels,
994 S.W.2d 142, 144 (Tex. 1999) 3

Quantum Chem. Corp. v. Toennies,
47 S.W.3d 473, 476 (Tex. 2001) 3

TEXAS STATUTES

TEX. LAB. CODE § 21.001(1) 2, 3, 4

I.

REPLY

A. *Cooper-Day* cannot be contorted into supporting Villanueva's incorporation theory.

Though recognizing this Court's holding in *Cooper-Day v. RME Petroleum Co.*¹ would foreclose Villanueva's pay discrimination claim absent judicial incorporation of the federal Ledbetter Act, Villanueva characterizes *Cooper-Day*'s analysis as "procedural" and, turning the case on its head, argues *Cooper-Day* actually supports her claim under this "procedural" theory. The links in Villanueva's illogical thread are strung together thusly:

1. Directly or indirectly, *Cooper-Day* relied on federal court interpretations of the term "occurred" in Title VII to analyze when a pay claim "occurs" under the TCHRA;
2. These federal interpretations led *Cooper-Day* to conclude that pay claims accrue at the time the employer's pay decision is made and the employee becomes aware of it;
3. The Ledbetter Act's paycheck accrual rule amended Title VII to overrule the federal court analysis relied upon by *Cooper-Day*; thus,
4. *Cooper-Day*'s "holding" is no longer good law but its reliance on "federal substantive law" in reaching that holding supports application of the Ledbetter Act.

This disingenuous argument may have facial appeal but it completely overlooks one important step in its progression: those federal court opinions relied upon by *Cooper-Day* were interpreting a Title VII provision that, at the time, was identical to the

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

current Texas statute. While Title VII has since been amended, the Texas statute has not. Thus, the federal court analysis relied upon by *Cooper-Day* actually supports the continued application of *Cooper-Day*'s holding because it reflected an interpretation of a Title VII provision that, at the time, was identical to the current Texas law.

While Congress may have subsequently disagreed with how the federal courts defined when a pay claim “occurs,” the Texas legislature has not joined (and may never join) this sentiment. Unless and until the Texas legislature amends the state law to make it consistent with the federal law, this Court should not judicially amend the TCHRA to incorporate the Ledbetter Act but should apply *Cooper-Day*'s holding to bar Villanueva's claim.

B. “Execution” of Title VII’s “policies” does not equal automatic incorporation of Title VII amendments.

Citing the “general purposes” provision in § 21.001(1) (a purpose of the TCHRA is to “provide for the execution of the policies of Title VII . . . and its subsequent amendments.”)² and various Texas cases extrapolating from this provision, Villanueva further confuses the issue by equating federal statutory law with judicial *interpretations* of Title VII's language. For example, she broadly states that Texas courts “have looked to federal law” in deciding when an act “occurs”³ and asserts that, in *Cooper-Day*, this court “looked to substantive federal law” to reach its conclusions.⁴ But neither this Court

² TEX. LAB. CODE § 21.001(1).

³ Appellee's Brief at page 7.

⁴ *Id.* at 10.

nor any other Texas court has ever directly superimposed federal statutory language on the TCHRA. Instead, the Texas judiciary has looked to federal court interpretations of Title VII provisions that have an analogue in the state law.⁵ This distinction is important as, without it, the slippery slope reflected by Villanueva’s argument gains traction and, before long, any Title VII amendment will be deemed Texas law simply by virtue of its passage in Washington, D.C. Clearly, when applying the TCHRA, a Texas court can (and should) examine how federal courts have interpreted similar provisions in Title VII. But wholesale judicial incorporation of a Title VII provision that has no TCHRA equivalent is fundamentally different than relying on federal interpretative case law for guidance. To the contrary, it is a usurpation of the Texas legislature’s power to decide if and how a Title VII amendment should be incorporated into Texas statutory law.

Admittedly, a facially-seductive response to this contention might be that the Texas legislature has given courts the power to judicially incorporate Title VII amendments into Texas law by virtue of § 21.001(1)’s statement that a general purpose of the TCHRA is to “execute” the “policies” of Title VII and its “subsequent amendments.” But can – or should – this provision really be read that broadly?

Certainly by including this passage, the Texas legislature thought it important that courts understand the TCHRA was designed to “correlate” state law with federal law “in the area of discrimination in employment.”⁶ But correlation is not equivalence. If it

⁵ See, e.g., *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 476 (Tex. 2001) (“Analogous federal statutes and the cases interpreting them guide our reading of the TCHRA.” (emphasis added)).

⁶ *NME Hosps., Inc. v. Rennets*, 994 S.W.2d 142, 144 (Tex. 1999).

were, the numerous significant differences between the two statutes would not exist.⁷ Moreover, the existence of these differences is not inconsistent with the language of § 21.001(1). The general policy of Title VII and its associated discrimination laws is to prevent employment discrimination on the basis of certain protected factors that Congress has deemed worthy of protection. The TCHRA furthers this policy by embedding these protections in Texas state law. This over-arching policy, however, can be legitimately furthered without the necessity of demanding absolute and strict consistency between how the state and the federal governments go about protecting employees from discrimination. There may be, and often are, legitimate disputes between Texas and Washington, D.C. on the merits of taking any given approach to enforcement of their respective anti-discrimination statutes. In this particular case, a sharply-divided Congress decided to give pay discrimination complainants more time to bring their claims. As yet, however, the Texas legislature has not and, until it does, this Court should adhere to its holding in *Cooper-Day* and refuse to judicially graft the Ledbetter Act onto the TCHRA.

II.

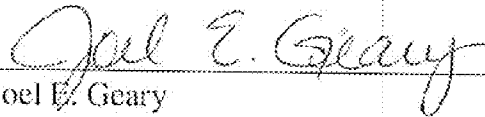
PRAYER

The trial court's order denying TRWD's Partial Plea to the Jurisdiction should be reversed and judgment rendered that the trial court lacks jurisdiction over Villanueva's gender discrimination claim.

⁷ See Appellant's Brief at notes 94-96.

Respectfully submitted,

VINCENT LOPEZ SERAFINO JENEVEIN, P.C.



Joel E. Geary
Texas Bar No. 24002129
1601 Elm Street, Suite 4100
Dallas, Texas 75201
214/979-7400
214/979-7402 – Facsimile

ATTORNEYS FOR APPELLANT
TARRANT REGIONAL WATER DISTRICT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served upon James R. Tanner, Tanner and Associates, PC, Plains Capital Bank Tower, 6000 Western Place, Suite 100, Fort Worth, Texas 76107-4654, and Peter Smythe, Peter Smythe, P.C., 211 N. Record Street, Suite 400, Dallas, Texas 75202, as attorneys for Appellee, by certified mail, return receipt requested on the 24th day of May, 2010.



Joel E. Geary

#173709
000328-00004